

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 2013-015 |
| Complainants, |) | (Enforcement – Water) |
| |) | |
| v. |) | |
| |) | |
| MIDWEST GENERATION, LLC, |) | |
| |) | |
| Respondent. |) | |

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 to Clarify and Confirm the Hearing Officer’s Limitation on the Use of the Historic Phase I and Phase II Reports, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: November 13, 2017

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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 to Clarify and Confirm the Hearing Officer's Limitation on the Use of the Historic Phase I and Phase II Reports was filed electronically on November 13, 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 on November 13, 2017 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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| |) | |
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**MIDWEST GENERATION, LLC’S MOTION TO CLARIFY AND CONFIRM
THE HEARING OFFICER’S LIMITATION ON THE USE OF
THE HISTORIC PHASE I AND PHASE II REPORTS**

Pursuant to 35 Ill. Adm. Code 101.502(b) and 101.626, Respondent, Midwest Generation, LLC (“MWG”), by its undersigned counsel, submits to the Hearing Officer this Motion to Confirm and Clarify the Hearing Officer’s Limitation on the Use of the Historic Phase I and Phase II Reports, identified as Exhibits 17D, 18D, 19D, 20D, 21, and 38. In support of its Motion, MWG states as follows:

- 1) On October 23, 2017, the Complainants moved to admit into evidence historic Phase I and Phase II Reports prepared for the former owner of the stations at issue:
 - a. Ex. 17D – the 1998 Phase II for the Powerton Station;
 - b. Ex. 18D – the 1998 Phase II for the Will County Station;
 - c. Ex. 19D – the 1998 Phase II for the Waukegan Station;
 - d. Ex. 20D – the 1998 Phase II for the Joliet 29 Station;
 - e. Ex. 21 – the 1998 Phase I for the Joliet 29 Station.

(Oct. 23, 2017 Transcript, pp. 99-124, excerpt attached as Attachment A)

- 2) MWG objected to the admission of the historic Phase I and II Reports because the reports were not business records of MWG. The reports were prepared for a different corporate entity. Moreover, each report specifically states that it was prepared for the benefit of the former owner, and any use of or reliance upon the information by a party other than specifically named in the report is at the risk of the third party. (Oct. 23, 2017 Transcript, p. 117:20 – 119:2, Attachment A).
- 3) The Hearing Officer initially sustained MWG's objection to the admission of Exhibit 17D, 18D, 19D, 20D, and 21. (Oct. 23, 2017 Transcript, p. 102:10-13, p. 112:11-14, p. 113:16-17, p. 119:17-20, p. 124:21-23, Attachment A).
- 4) Later in the proceeding, the Hearing Officer reversed his decision regarding the historic Phase I and Phase II Reports and ruled to admit Exhibits 17D, 18D, 19D, 20D, and 21 into evidence over MWG's objections. (Oct. 23, 2017 Transcript, p. 126:6-14, Attachment A)
- 5) Following that reversal, counsel for MWG made the following request which was granted by the Hearing Officer and affirmed by counsel for Complainants:

MS. NIJMAN: We would ask that the ruling be limited then to -- for the purpose of relevancy the questions that are actually asked from that document. In other words, the concern is that there is a discussion with Ms. Race on one issue and then the closing brief comes around and something is pulled out of the back of that report that has nothing to do with the testimony.

HEARING OFFICER HALLORAN: I grant that. Ms. Bugel, do you understand in your -- in your hearing brief, your -- your briefing is limited to the questions you have asked of Ms. Race regarding these exhibits?

MS. BUGEL: Okay. Well, then I would like the opportunity to go back and ask additional questions.

HEARING OFFICER HALLORAN: That's why I reversed my position now while Ms. Race is still in front of me.

(Oct. 23, 2017 Transcript, pp. 126:15-127:9, Attachment A).

- 6) Later in the day on October 23, 2017, Complainants moved to admit Exhibit 38, the 1998 Phase I Report for the Waukegan Station prepared for the former property owner. (Oct. 23, 2017

Transcript, p. 138:2-4, Attachment A). MWG objected to the admission of Exhibit 38, and the Hearing Officer admitted the report over MWG's objection. (Oct. 23, 2017 Transcript, p. 138:5-12, Attachment A). As a 1998 Phase I Report, Exhibit 38 is similar to Exhibits 17 through 21 and the Hearing Officer's limitation on use (¶5, above) should apply to all the Phase I and Phase II reports.

7) MWG respectfully request that the Hearing Officer confirm and clarify that parties' use of or reliance on each of the Phase I and Phase II Reports, identified as Exhibits 17D, 18D, 19D, 20D, 21 and 38, is limited to the information discussed at the hearing with Ms. Race.

WHEREFORE, for the reasons stated above, MWG requests that the Hearing Officer confirm that the parties' use of or reliance on each of the Phase I and Phase II Reports identified as Exhibits 17D, 18D, 19D, 20D, 21 and 38, is limited to the information discussed at the hearing with Ms. Race.

Respectfully submitted,
Midwest Generation, LLC

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

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Susan M. Franzetti
Kristen L. Gale
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ATTACHMENT A

ILLINOIS POLLUTION CONTROL BOARD
August 31, 2017

SIERRA CLUB, ENVIRONMENTAL)
LAW & POLICY CENTER,)
PRAIRIE RIVERS NETWORK AND)
CITIZENS AGAINST RUINING)
THE ENVIRONMENT,) No. PCB 13-15
)
Complainants,)
)
vs)
)
MIDWEST GENERATION, LLC,)
)
Respondent.)

REPORT OF THE PROCEEDINGS had at the hearing on a motion of the above-entitled cause before the Honorable BRADLEY HALLORAN, Hearing Officer of said Court, Room 9-040, The Thompson Center, Chicago, Illinois, on the 23rd day of October, 2017, at the hour of 9:07 a.m.

L.A. Court Reporters, L.L.C.
312-419-9292

1 MS. BUGEL: Just for the record --
2 Strike that. We -- can I have Exhibit 17?

3 MS. NIJMAN: Is this
4 non-disclosable, Faith?

5 MS. BUGEL: I'm sorry?

6 MS. NIJMAN: Is this non-disclosable
7 information?

8 MS. BUGEL: No, it's not. Just
9 so -- we have no intentions -- I have no
10 intentions of using additional non-disclosable
11 information with Ms. Race today.

12 MS. NIJMAN: Thank you.

13 BY MS. BUGEL:

14 Q. I have what has been marked as
15 Complainants' Exhibit 17D.

16 (Document marked as Complainants
17 Exhibit No. 17D for
18 identification.)

19 BY MS. BUGEL:

20 Q. This is titled Commonwealth Edison
21 Company Phase Two Environmental Site Assessment
22 Powerton Generating Station that I'm placing in
23 front of you.

24 HEARING OFFICER HALLORAN: Thank

1 you.

2 BY MS. BUGEL:

3 Q. Are you familiar with this document?

4 A. I'm familiar with it, yes.

5 Q. And can you describe what this is
6 for the record?

7 A. Sure. This is a Phase Two
8 Environmental Site Assessment that was done under
9 the direction of Commonwealth Edison when they
10 were selling the power plants in question.

11 Q. And do you know who they sold the
12 power plants in question to?

13 A. Midwest Generation.

14 Q. And did you see one -- one of these
15 for each of the four Midwest Generation
16 facilities?

17 A. Yes, I have.

18 Q. And are you aware of whether these
19 Phase Two Environmental Site Assessments -- I'm
20 sorry.

21 Let me -- are you aware of
22 whether this phase two Exhibit 17D contains boring
23 logs?

24 A. It should, certainly does, yes.

1 Q. And can you please turn to page
2 3309.

3 A. Okay.

4 Q. And that is the boring log for bore
5 hole B10, do you see that?

6 A. Yes, I do.

7 Q. And under description
8 classification, do you see in parenthesis where it
9 says coal/slag?

10 A. Yes.

11 MS. FRANZETTI: I'm going to object
12 at this point because this -- there is no
13 foundation for getting into this document with
14 this witness. It's not been admitted into
15 evidence, she did not prepare it, it was not
16 prepared for Midwest Gen and now we're going into
17 a lot of questions about the contents of this
18 document. So that's the basis for my objection.

19 HEARING OFFICER HALLORAN: Thank
20 you. Ms. Bugel?

21 MS. BUGEL: She said she's reviewed
22 this document. It is admissible because Midwest
23 Generation is in privity with Commonwealth Edison
24 as the purchaser of the property and Ms. Race has

1 established that she had responsibility for
2 environmental issues and reviewed the document.

3 MS. FRANZETTI: With respect to the
4 privity comment, I do not -- there is no rule of
5 evidence that says that a company that buys a
6 piece of property from another company is bound by
7 any document prepared by the prior company. This
8 was not a merger. This was a purchase of an
9 asset.

10 HEARING OFFICER HALLORAN: Yeah. I
11 agree. I'm going to sustain your objection,
12 Ms. Franzetti. However, you may continue,
13 Ms. Bugel, as an offer of proof.

14 MS. BUGEL: Okay.

15 HEARING OFFICER HALLORAN: So any
16 questions you ask of Ms. Race is an offer of
17 proof.

18 MS. BUGEL: Okay.

19 BY MS. BUGEL:

20 Q. Ms. Race, was it your practice to
21 review environmental site assessments that were
22 available when -- for properties that Midwest
23 Generation was purchasing?

24 A. If I became aware of a document,

1 then I would review it if it regarded the
2 environmental compliance or anything interesting
3 environmentally at the sites.

4 Q. And environmental site assessments
5 relate to the environmental compliance, correct?

6 A. It's a historic document because I
7 don't know how it was prepared. I don't -- I
8 didn't direct it. I wasn't even working at
9 Midwest Generation at the time of the sale. So,
10 for me, I looked at it as a historic document that
11 gave me some information that could be helpful at
12 times of interest.

13 Q. And the information that it gave
14 you, in what way was that helpful at times?

15 A. Well, sometimes when I would look at
16 the information, you know, something like these
17 borings you could look at it and think, well, this
18 is what they were finding the way that they were
19 sampling, you know, in this area or if you looked
20 at one of the maps in here you could gather
21 information about where an old switch yard was or,
22 you know, if the coal pile had always been in the
23 same place and things like that. You would just
24 look for information and I wasn't looking at it as

1 the Gospel truth, but it would give me additional
2 information when we were performing work.

3 Q. When -- do you know when phase two
4 environmental site assessments are conducted? For
5 instance, what triggers a phase two environmental
6 site assessment instead of stopping at a phase
7 one?

8 MS. FRANZETTI: Objection to form.
9 There has been no foundation laid that this
10 witness is familiar enough with environmental site
11 assessments to answer questions about what order
12 they're performed in, et cetera. There is just no
13 foundation that this witness has personal
14 knowledge of --

15 HEARING OFFICER HALLORAN: It goes
16 to the weight, not the admissibility. Overruled.
17 You may answer if you're able and you can cross if
18 you'd like.

19 BY THE WITNESS:

20 A. I'm not entirely sure what that is
21 except that in my experience whenever there has
22 been a sale for anything from, you know, the coal
23 plants to the wind farm phase ones and twos were
24 done.

1 BY MS. BUGEL:

2 Q. So phase ones and phase twos are
3 standard practice when industrial property is
4 being sold?

5 A. I don't know.

6 MS. FRANZETTI: Objection.
7 Mischaracterization of the witness's testimony.

8 HEARING OFFICER HALLORAN:
9 Sustained. Rephrase.

10 BY MS. BUGEL:

11 Q. You've seen phase two -- phase ones
12 and phase twos for pieces of property being bought
13 and sold by Midwest Gen, correct?

14 A. Or Edison Mission Energy.

15 Q. Have you ever in your experience at
16 Midwest Gen or Edison Mission Energy seen an
17 industrial property bought or sold without a phase
18 one?

19 A. I think that when NRG, and I don't
20 know this for a fact so maybe I shouldn't venture
21 here, but I think when NRG purchased Midwest
22 Generation I'm not sure that a new phase one was
23 performed, but I'm not entirely sure.

24 Q. Is that the only example you can

1 think of?

2 MS. FRANZETTI: Objection to form.
3 That's an example of a major company buying
4 several properties. So I think you're
5 mischaracterizing --

6 MS. BUGEL: That's an example of a
7 major company --

8 MS. FRANZETTI: -- her testimony.

9 HEARING OFFICER HALLORAN: Counsel,
10 counsel, remember at the beginning off the record
11 I asked you not to talk over each other and stop
12 when I talk?

13 MS. BUGEL: Okay. I apologize.

14 HEARING OFFICER HALLORAN: Ms.
15 Franzetti, you may continue and then, Ms. Bugel,
16 you can respond.

17 MS. FRANZETTI: I'm objecting to her
18 mischaracterization of the testimony because she
19 says is that the only example and that example
20 involves purchasing multiple station's properties.
21 So it's a mischaracterization to say it's only one
22 time.

23 HEARING OFFICER HALLORAN: Okay.
24 Overruled. You can clear it up on cross.

1 Ms. Bugel, you can continue or Ms. Race can answer
2 if she is able.

3 BY MS. BUGEL:

4 Q. And NRG's purchase of Midwest
5 Generation was a purchase of the whole company
6 Midwest Generation, correct?

7 A. I'm not sure of the way that it
8 worked financially. I do know that NRG bought all
9 of the wind farms and the power plants that
10 Midwest Generation and Edison Mission Energy was
11 operating.

12 MS. BUGEL: If you give me one
13 moment, please.

14 BY MS. BUGEL:

15 Q. And can you turn to page one,
16 please?

17 A. Of document -- of 17D?

18 Q. Yeah, and that's Bates page 3257.

19 A. All right.

20 Q. Do you see the sentence in the
21 middle of the first paragraph "Phase two ESA
22 activities consisted of advancement of soil
23 borings, installation of monitoring wells and
24 collection of surface and subsurface soil sediment

1 and groundwater samples," do you see that?

2 A. Oh, right up here in the first
3 paragraph?

4 Q. Yes.

5 A. I'm sorry. I was looking in the
6 middle of the page, but, yes, I do see that now.

7 Q. And do you see the next sentence
8 after that "The purpose of the phase two ESA was
9 to investigate the potential presence of
10 contamination in the areas of environmental
11 concern identified in the phase one environmental
12 site assessment phase one ESA," do you see that?

13 A. Yes, I do.

14 MS. BUGEL: Hearing Officer, I would
15 offer that this -- we've laid out the purpose of
16 the phase two ESA and the witness has indicated
17 that, when available, she reviews phase two ESA's.
18 Obviously, this is not binding on Midwest Gen, but
19 this is still evidence that is -- that meets the
20 board's standard of being evidence that the board
21 may reasonably rely upon.

22 HEARING OFFICER HALLORAN: Is this a
23 publicly available document?

24 MS. NIJMAN: It is not.

1 MS. FRANZETTI: No.

2 HEARING OFFICER HALLORAN: Is this a
3 publicly available --

4 MS. BUGEL: I -- I don't believe so,
5 but it's -- I think it's -- I think we've
6 established that this is a business record, a
7 fair, somewhat routine to be done when companies
8 are buying and selling property. The purpose of
9 it is laid out right here in the first paragraph
10 and the witness reviewed it and says she relies on
11 the documents of this type.

12 HEARING OFFICER HALLORAN: Okay.
13 I'm going to still go with my original ruling as
14 an offer of proof and you can complain to the
15 board or follow up with the board 14 days after
16 the transcript is available.

17 MS. BUGEL: Okay.

18 HEARING OFFICER HALLORAN: Thank
19 you.

20 MS. BUGEL: So it's out right now?

21 HEARING OFFICER HALLORAN: Right.
22 I'm taking it as an offer of proof, but not into
23 evidence, correct.

24 MS. BUGEL: It's not into evidence.

1 Am I still permitted to ask the witness further
2 questions about it or no?

3 HEARING OFFICER HALLORAN: In the
4 parameters of an offer of proof.

5 MS. BUGEL: Okay.

6 HEARING OFFICER HALLORAN: Just let
7 me know when you're -- when you're finished.

8 MS. BUGEL: Can we go off the record
9 for a second?

10 HEARING OFFICER HALLORAN: Sure.
11 We're off the record for a second.

12 (Whereupon, a break was taken
13 after which the following
14 proceedings were had.)

15 HEARING OFFICER HALLORAN: We're
16 back on the record. Ms. Bugel?

17 (Document marked as Complainants
18 Exhibit No. 18D for
19 identification.)

20 BY MS. BUGEL:

21 Q. I am placing in front of you what
22 has been marked as Complainants' Exhibit 18D.
23 Sorry. Let me -- I handed that to you too soon.
24 And the title of the document is Commonwealth

1 Edison Company Phase Two Environmental Site
2 Assessment and it's Bates MWG 13-15_5699 and it's
3 for Will County Generating Station, are you
4 familiar with this document?

5 A. Yes, I am familiar with this
6 document.

7 Q. And have you previously reviewed
8 this document as well?

9 A. Yes, I have previously reviewed this
10 document.

11 Q. And Commonwealth Edison was the
12 previous owner of the Will County Generating
13 Station?

14 A. Yes, they were.

15 Q. And Midwest Generation purchased the
16 Will County Generating Station from ComEd?

17 A. Yes.

18 Q. And this phase two also contains
19 boring logs for the site?

20 A. Yes, it does.

21 MS. BUGEL: We will do -- I'll just
22 do them one at a time.

23 HEARING OFFICER HALLORAN: Okay.

24 MS. BUGEL: Hearing Officer, we

1 would move for Complainants' Exhibit 18D to be
2 moved into evidence.

3 HEARING OFFICER HALLORAN: Midwest?

4 MS. FRANZETTI: Same objection by
5 Midwest as to Exhibit 17D for 18D.

6 MS. BUGEL: And complainants would
7 offer the same response and ask the same questions
8 of the witness as we did for 17D -- as we did for
9 17D, we would ask the same questions for 18D as an
10 offer of proof.

11 HEARING OFFICER HALLORAN: Correct.
12 I sustained Midwest's objection and I will take it
13 as an offer of proof. So noted on the record.
14 Thank you.

15 MS. BUGEL: And complainants have
16 what has been marked as Complainants' Exhibit 19D
17 and this is the Commonwealth Edison Company Phase
18 Two Environmental Site Assessment for Waukegan
19 Generating Station beginning at Bates 45779. I'm
20 placing that in front of you.

21 (Document marked as Complainants
22 Exhibit No. 19D for
23 identification.)

24

1 BY MS. BUGEL:

2 Q. Are you familiar with this document?

3 A. Yes, I am.

4 Q. And have you previously reviewed
5 this document?

6 A. Yes, I have reviewed this document
7 before.

8 Q. And to the best of your
9 recollection, does this also contain boring logs?

10 A. Yes, it does.

11 MS. BUGEL: And, Hearing Officer,
12 complainants move for Exhibit 19D to be admitted
13 into evidence.

14 MS. FRANZETTI: Same objection as to
15 17D and 18D for 19D.

16 HEARING OFFICER HALLORAN: Okay.
17 Sustained. I'll take it as an offer of proof.

18 MS. BUGEL: And, for the record, may
19 we note we would ask the same questions of the
20 witness for the offer of proof?

21 HEARING OFFICER HALLORAN: So noted.
22 Thank you.

23 BY MS. BUGEL:

24 Q. And complainants -- we have what has

1 been marked as Complainants' Exhibit 20D and this
2 is the Commonwealth Edison Company Phase Two
3 Environmental Site Assessment Bates 23301 for
4 Joliet 29 Generating Station.

5 Are you familiar with this
6 document?

7 A. Yes, I am.

8 Q. And have you previously reviewed
9 this document?

10 A. Yes, I have.

11 Q. And do you -- does this document
12 also contain boring logs to the best of your
13 recollection?

14 A. I'm just looking right now to see if
15 it does. Yes, I see monitoring well construction
16 and some boring logs, yes.

17 MS. BUGEL: And, Hearing Officer, my
18 questions about this one would actually be a
19 little bit different.

20 HEARING OFFICER HALLORAN: You may
21 proceed.

22 MS. BUGEL: Thank you.

23 BY MS. BUGEL:

24 Q. Can you please turn to page 25 --

1 wait a minute. Wrong page. 23339. Again, 23339.

2 A. Okay.

3 Q. And does that appear to be a map
4 representing the Joliet Generating Station and
5 property?

6 A. Yes, it appears to be a map that
7 ENSR put together of Joliet Generating Station 29.

8 Q. And does that map indicate -- are
9 you familiar with the abandoned ash disposal area
10 at Joliet?

11 A. I am familiar with an area where
12 there is ash on the -- which side of the property
13 is this? It must be northeast side of the
14 property because we have -- it's part of our NPDES
15 storm water permit.

16 Q. And do you see the abandoned ash
17 disposal area is still at Joliet?

18 A. I don't think I would characterize
19 it that way, but I believe that there is still ash
20 being maintained under a cap with vegetation on it
21 at Joliet in the northeastern area of the property
22 if I've got my directions right. Yeah, I think I
23 do.

24 MS. FRANZETTI: I'm sorry to

1 interrupt. Can I get the page number that we're
2 on because --

3 HEARING OFFICER HALLORAN: 23339.

4 MS. BUGEL: 23339. It just says
5 ash landfill on mine.

6 MS. NIJMAN: Yeah, we can't find
7 where it says abandoned ash landfill. Can you
8 point that out, Faith?

9 MS. BUGEL: Okay. That question
10 wasn't about the document. That was about -- that
11 was asking the witness --

12 THE WITNESS: Well, all right. That
13 kind of clarifies it, but I think my answer would
14 be the same.

15 BY MS. BUGEL:

16 Q. My only question about the
17 document --

18 A. I know the -- I guess the way I
19 would answer it is I know that there is an ash
20 fill area in the northeastern section of the
21 property that we maintain under our NPDES storm
22 water permit or storm water plan under our NPDES
23 permit.

24 Q. And how did you come to know that

1 there was an ash fill area on the property in the
2 location that you just described?

3 A. Just from reviewing the NPDES
4 documents when I was first working there. I
5 actually didn't probably see this document for two
6 or three years.

7 Q. Okay.

8 MS. BUGEL: Okay. And I have no
9 further questions about this document in the offer
10 of proof.

11 HEARING OFFICER HALLORAN: Okay.

12 MS. BUGEL: Complainants would move
13 to admit Complainants' Exhibit 20D into evidence.

14 HEARING OFFICER HALLORAN: Midwest,
15 Ms. Franzetti, give me your full objection,
16 please.

17 MS. FRANZETTI: Okay.

18 HEARING OFFICER HALLORAN: I know
19 it's the same as the others.

20 MS. FRANZETTI: All right. We
21 object to this on the grounds that it is not a
22 business record of Midwest Gen and it is not
23 admissible under any other hearsay exception to
24 the rules of evidence. This and the other three

1 are reports that were prepared for a completely
2 different corporate entity, namely Commonwealth
3 Edison Company. It was not prepared for Midwest
4 Gen and I would further point out that in each of
5 these reports at the end of the introductory
6 section in the last paragraph it states, quote,
7 this report and all field data notes and
8 laboratory test data, hereinafter collectively
9 information, were prepared by ENSR solely for the
10 benefit of ENSR's client ComEd. ENSR's client may
11 release this information to third-parties who may
12 use and rely upon the information at their own
13 discretion.

14 However, any use or reliance
15 upon this information by a party other than
16 parties identified shall be solely at the risk of
17 such third-party and without recourse to ENSR.
18 This information -- and it goes on at the end to
19 say "This information shall not be used or relied
20 upon by a party which does not agree to be bound
21 by the above statement."

22 There is no evidence that
23 Midwest Gen agreed to be bound by those statements
24 and that is an additional reason why this is

1 unreliable information with respect to Midwest
2 Gen's ownership and operation of these stations.

3 HEARING OFFICER HALLORAN: What page
4 were you reading from?

5 MS. FRANZETTI: I was --
6 specifically for that one, but it's the same
7 statement on all of them, I was referring to
8 Exhibit 20D this phase two report for Joliet 29
9 and the Bates number is Midwest Gen 13-15_23309.

10 HEARING OFFICER HALLORAN: But
11 Ms. Race did rely on them from time to time for
12 all four of these exhibits?

13 MS. NIJMAN: She said.

14 MS. FRANZETTI: I think rely is too
15 strong of a word. She used it as a source of
16 information at times.

17 HEARING OFFICER HALLORAN: Okay.
18 Thank you. All right. So I'm taking them as an
19 offer of proof. Exhibit's -- what is it -- 20,
20 19, 18 and 17.

21 MS. BUGEL: Can I get a response on
22 the record to Ms. Franzetti's last statement?

23 HEARING OFFICER HALLORAN: Sure.

24 MS. BUGEL: We would point out that

1 the hearsay objection governed by Rule
2 801(d)(2)(f) a statement of a party opponent -- it
3 comes in as a statement of a party opponent when
4 the statement was made by an entity in privity
5 with a party and privity -- transferred property
6 is privity. That puts Midwest Generation in
7 privity of a property.

8 In addition, this is an ancient
9 document as well and statements in ancient
10 documents are the hear -- fall within the hearsay
11 objection under Rule 803.16. I'm sorry. A
12 hearsay exception. Finally, I object to the part
13 that Ms. Franzetti read into evidence which, to
14 me, sounds like ENSR's release from liability as
15 opposed to something broader than that that
16 governs future purchasers and I also think that
17 Ms. Race as you pointed out, Hearing Officer, she
18 did review those documents. She is in
19 environmental compliance. Phase twos are common
20 when property is being transferred and that makes
21 this not -- reliable evidence, reasonable -- the
22 reliable evidence that a reasonable person would
23 rely on in this proceeding.

24 HEARING OFFICER HALLORAN: Okay.

1 Thank you, Ms. Bugel. Anything else?

2 MS. FRANZETTI: No.

3 HEARING OFFICER HALLORAN: Okay.

4 Thank you.

5 MS. BUGEL: Can I have one moment to
6 confer with counsel?

7 HEARING OFFICER HALLORAN: I'm
8 thinking about a lunch in about 13 minutes if that
9 helps.

10 (Whereupon, a break was taken
11 after which the following
12 proceedings were had.)

13 HEARING OFFICER HALLORAN: We're
14 back on the record.

15 BY MS. BUGEL:

16 Q. I have what has been marked as
17 Complainants' Exhibit 21. It is -- it begins
18 Bates page 25139. It is titled Commonwealth
19 Edison Company Phase One Environmental Site
20 Assessment of Commonwealth Edison Joliet 29
21 Generating Station and I am placing it in front of
22 you.

23 Are you familiar with this
24 document, Ms. Race?

1 (Document marked as Complainants
2 Exhibit No. 21 for
3 identification.)

4 MS. NIJMAN: I'm sorry. Is this an
5 offer of proof?

6 HEARING OFFICER HALLORAN: We
7 haven't gotten there yet I don't think. This is
8 slightly different she said. So we'll see when we
9 get there I guess, Ms. Nijman.

10 BY THE WITNESS:

11 A. I have seen this document before.

12 BY MS. BUGEL:

13 Q. And have you -- you've reviewed this
14 document before?

15 A. Yes, I have reviewed it, but I
16 probably haven't spent that much time with it
17 because it wasn't readily available. I think it
18 was in storage.

19 Q. Do you recall when you first
20 reviewed it?

21 A. Maybe 2003, 2002. Something like
22 that.

23 Q. And, specifically, can you turn to
24 page -- I need my copy. Can you please turn to

1 page 25149.

2 A. Yes.

3 Q. Have you reviewed this map before?

4 A. It looks similar to the one that was
5 in the phase two document that you showed me
6 earlier.

7 Q. And do you notice any differences
8 from the earlier map?

9 MS. FRANZETTI: Objection to form.
10 I'm not sure what's covered by differences.

11 HEARING OFFICER HALLORAN:
12 Sustained.

13 BY MS. BUGEL:

14 Q. You said it looks similar to. Do
15 you see anything --

16 A. Nothing is jumping out at me as
17 being different.

18 Q. Okay. For what purpose did you
19 review this document?

20 A. Just to see what a prior
21 consultant's thoughts were on the site.

22 HEARING OFFICER HALLORAN: Prior
23 consultants what?

24 THE WITNESS: Thoughts were.

1 BY MS. BUGEL:

2 Q. And those thoughts would be related
3 to environmental issues because this is an
4 environmental site assessment?

5 A. Yes.

6 MS. BUGEL: Complainants offer
7 Complainants' Exhibit 21 into evidence.

8 HEARING OFFICER HALLORAN: Ms.
9 Franzetti?

10 MS. FRANZETTI: Same objection as
11 before. This is, again, a report by ENSR for
12 Commonwealth Edison. It is not a business record
13 of Midwest Generation.

14 MS. BUGEL: Same response as before.
15 This is an environmental document. It relates to
16 environmental issues at the site. Ms. Race is --
17 in one of her responsibilities is environmental
18 issues and she has reviewed this document and it
19 is -- meets the board's test of evidence a
20 reasonable person would rely on.

21 HEARING OFFICER HALLORAN: I'll take
22 it as an offer of proof. So Exhibit 21 is taken
23 as an offer of proof.

24 We have about five or six

1 minutes and I'm hoping to take a lunch break. I
2 don't know how many more witnesses or questions
3 you have for Ms. Race.

4 MS. BUGEL: I would say we're about
5 halfway done with Ms. Race.

6 HEARING OFFICER HALLORAN: When do
7 you think -- when do you think a good time to
8 stop?

9 MS. BUGEL: If you want -- right now
10 is a fine time to stop if we can stop.

11 HEARING OFFICER HALLORAN: Okay.
12 Let's go off the record for a minute.

13 (Whereupon, a break was taken
14 after which the following
15 proceedings were had.)

16 HEARING OFFICER HALLORAN: Back on
17 record. We're going to take an hour lunch so
18 hopefully everybody will be back by, what is that,
19 1:25. Thank you.

20 (Whereupon, a break was taken
21 after which the following
22 proceedings were had.)

23 HEARING OFFICER HALLORAN: Thank
24 you. We're back on the record. It is

1 approximately 1:28. Over lunch I reviewed my
2 decision regarding these ComEd Phase Two
3 Environmental Site Assessment exhibits and I
4 wanted to make my ruling while Ms. Race was still
5 here.

6 You know, looking at this rule I
7 don't even have to get to any hearsay issues. I
8 consider Ms. Race a reasonable and prudent person
9 and she reviewed these documents and I don't think
10 she would have reviewed them for a waste of time
11 and, you know, that's all Section 101.626
12 requires. So I'm reversing my offer of proof
13 rulings on Complainants' Exhibit 17D, 18D, 19D,
14 20D and Exhibit 21.

15 MS. NIJMAN: We would ask that the
16 ruling be limited then to -- for the purpose of
17 relevancy the questions that are actually asked
18 from that document. In other words, the concern
19 is that there is a discussion with Ms. Race on one
20 issue and then the closing brief comes around and
21 something is pulled out of the back of that report
22 that has nothing to do with the testimony.

23 HEARING OFFICER HALLORAN: I grant
24 that. Ms. Bugel, do you understand in your -- in

1 your hearing brief, your -- your briefing is
2 limited to the questions you have asked of
3 Ms. Race regarding these exhibits?

4 MS. BUGEL: Okay. Well, then I
5 would like the opportunity to go back and ask
6 additional questions.

7 HEARING OFFICER HALLORAN: That's
8 why I reversed my position now while Ms. Race is
9 still in front of me.

10 MS. BUGEL: Thank you. May I have
11 one moment to confer with co-counsel?

12 HEARING OFFICER HALLORAN: Yes.
13 We're off the record again.

14 (Whereupon, a discussion was had
15 off the record.)

16 HEARING OFFICER HALLORAN: We're
17 back on the record, Ms. Bugel. Ms. Race, you're
18 still under oath. Thank you.

19 MS. BUGEL: I'm taking a moment just
20 to go back to my previous questions.

21 BY MS. BUGEL:

22 Q. Can we please turn back to Exhibit
23 17D.

24 A. Yes.

1 storage area.

2 MS. BUGEL: And complainants move
3 for Complainants' Exhibit 38 to be admitted into
4 evidence.

5 HEARING OFFICER HALLORAN: Ms.
6 Nijman?

7 MS. FRANZETTI: Same objections as
8 to the historic nature of the document not done
9 for this company. Hearsay.

10 HEARING OFFICER HALLORAN: Thank
11 you. Overruled based on 101.626. Thank you.
12 Complainants' Exhibit 38 is admitted.

13 (Document marked as Complainants
14 Exhibit No. 22 for
15 identification.)

16 BY MS. BUGEL:

17 Q. Okay. I have what has been marked
18 as Complainants' Exhibit 22 and it is an e-mail
19 and the title -- the subject line of the e-mail is
20 subgrade for Joliet 29 ash pond two liner. I am
21 placing that in front of you.

22 Are you familiar with this
23 document?

24 A. I have seen this document before.