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
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 Respondent, Midwest Generation, LLC's Response to Complainants' Motion for Leave to File Reply or in the Alternative, Motion for Leave to File Sur-Reply, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: May 11, 2020

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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 Respondent, Midwest Generation, LLC's Response to Complainants' Motion for Leave to File Reply or in the Alternative, Motion for Leave to File Sur-Reply was filed on May 11, 2020 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 May 11, 2020 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

MIDWEST GENERATION, LLC'S RESPONSE TO COMPLAINANTS' MOTION FOR LEAVE TO FILE REPLY OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE SUR-REPLY

Pursuant to 35 Ill. Adm. Code 101.500(e) and 101.610[1], Respondent, Midwest Generation, LLC ("MWG"), by its undersigned counsel, responds and objects to Complainants' Motion for Leave to Reply to MWG's Response to Complainants' Motion to Designate Substitute Expert Witnesses. Under the Illinois Pollution Control Board's ("Board") procedural rules, a reply memorandum is not allowed except to "prevent material prejudice." 35 Ill. Adm. Code 101.500(e). Complainants have failed to meet that standard. Despite presenting a reply longer than their original motion and memorandum combined, Complainants still have not presented any authority that supports Complainants' motion for a wholesale replacement of their existing experts without any basis, long after extensive expert discovery has taken place.

[1] The Hearing Officer has a duty to "to conduct a fair hearing, … and to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610.

The information already provided to the Hearing Officer is more than sufficient to enable a determination on whether Complainants should be allowed to entirely replace their expert witnesses after discovery is complete. Even if Complainants believe that their Motion to designate substitute expert witnesses somehow insufficient, Complainants' proposed reply memorandum provides no new information or new Board or Illinois Court authority to cure the purported deficiency. The proposed reply memorandum solely addresses issues that Complainants already addressed in their original motion. *See* Complainants' Motion, at 3-6.

I. Complainants' Reply Merely Repeats Arguments Made in their Motion and Memorandum in Support

The Board has made it clear that when the issues are fully briefed, no reply is necessary. *Roger and Romana Young v. Gilster-Mary Lee Corp.* 2001 Ill. ENV LEXIS 290, PCB00-09 slip op at 1, (June 21, 2001). When the reply offers no assistance and the movant would suffer no material prejudice, a motion for leave to file a reply should be denied. *Commonwealth Edison v. Illinois Environmental Protection Agency*, 2007 WL 1266937, PCB04-215, slip op at 2 (April 26, 2007) (B. Halloran). Complainants' motion provides no evidence that their reply memorandum offers the Hearing Officer additional assistance and Complainants fail to establish that they will suffer material prejudice. The only stated basis for Complainants' motion for leave to file a reply is that they claim MWG raised new arguments, which is not the case. MWG's Response simply addressed the incorrect statements and lack of any supporting law in Complainants' request to substitute its experts. Specifically, in response to Complainants' incorrect assertion that discovery was somehow open, MWG explained that discovery on the entire case had already been conducted and has not been reopened. (Complainants' Mot., p. 5; MWG's Res. pp. 2-4). Because Complainants mistakenly relied on the outdated Illinois Supreme Court Rule 220, MWG responded by pointing out that Illinois Supreme Court Rule 213 applies and imposes strict

discovery restrictions. (Complainants' Mot. p. 3, 5; MWG's Res. pp. 7-8). Similarly, MWG responded to Complainants' baseless assertion that MWG would not be prejudiced by the wholesale replacement of expert witnesses at a late stage of litigation. (Complainants' Mot. p. 3-6; MWG's Res. p. 8). In fact, Complainants should not be surprised by any of MWG's arguments because they were all identified by MWG in its email to the Hearing Officer on March 23, 2020 which Complainants attached as Ex. A to their motion.[2]

II. Complainants' Proposed Reply Still Provides No Basis for the Complete Replacement of their Experts

Complainants' proposed reply is merely an improper attempt to answer MWG's response, and Complainants still give no basis to substitute all of their experts. The Board's procedural rules provide for the filing of a motion and a response. A reply is only permitted in unusual circumstances, and with leave. Thus, a movant is compelled to include in its motion all the relevant bases for a request, rather than waiting to see what kind of arguments a party might raise in response. Here, Complainants filed a motion without appropriate legal or factual support or analysis and, after seeing MWG's Response, now seek to have another try. Complainants acknowledge that they "could have provided more detail" on their basis to substitute their expert, James Kunkel ("Kunkel"). (Reply. 6). But, instead of taking the opportunity in their reply to provide such detail, Complainants make the remarkable statement that they need not give any reasons to the Hearing Officer to grant their motion. Complainants state that while they could have given more detail, "we do not believe it either appropriate or necessary to provide that level of detail at this time…". *Id.* It is rather inexplicable to make a request of a hearing officer and state that the hearing officer does not need the basis for granting that request. Similarly, Complainants

[2] Complainants do not dispute that the purpose of bifurcating the case was administrative economy, and that a wholesale reopening of discovery would foil that purpose.

simply restate that their other expert, David Schlissel ("Schlissel") desires to withdraw from the case, but provide no new information in support. Complainants cannot claim that they would be materially prejudiced if the Hearing Officer denies their request for a reply when they provide no additional information from what they provided in their motion.

Complainants' proposed reply seeks to argue about cases cited by MWG, when Complainants should have researched and cited those cases in their original motion. Complainants' decision not to include a full analysis was at their own risk, and their motion for leave to reply to add the analysis that should have been in their motion should be denied. Complainants' reply also makes apparent that that they no longer believe their experts to be reliable. Complainants point to a case cited by MWG and state that they are in a similar situation. (Reply, p. 6, citing MWG's Response, pp.4-5, citing *United States for the Use & Benefit of Agate Steel, Inc. v. Jaynes Corp.*, 2015 U.S. Dist. LEXIS 45379 (D. Nev. Apr. 6, 2015). But in the *Jaynes Corp.* case, the court granted substitution of a party's expert because the expert and the party were adverse in an arbitration, and so the party could no longer rely on the expert. *United States for the Use & Benefit of Agate Steel, Inc. v. Jaynes Corp.*, 2015 U.S. Dist. LEXIS 45379, *4. Complainants do not include any additional evidence that they are somehow "adverse" to their experts and Complainants appear to be stating that they cannot rely on their experts for some unknown reason. If Complainants now believe that Kunkel is not a reliable expert, then they should advise the Board so the Board may reevaluate its opinion on liability and reconsider its conclusions.

III. Discovery on Both Liability and Remedy has been Completed

Complainants' motion for leave to file a reply should be denied because it relies upon the false premise that discovery in this matter is "open." The procedural history of this lawsuit, as described in MWG's response and not disputed by Complainants, establishes that discovery was completed for all phases of the case, and then closed. Discovery for all issues related to the case

began on May 14, 2014 and the Parties reported to the Hearing Officer that discovery was complete on April 14, 2016. (Hearing Officer Order, May 14, 2014; Hearing Officer Order, April 14, 2016). The discovery related to both liability and remedy and both parties acted accordingly, including presenting expert reports both on liability and remedy. (See, e.g., reports attached as exhibits to MWG's Response). While discovery will be updated according to standard discovery requirements, updating prior responses does not "open" discovery. In fact, the Board recognized in its February 6, 2020 Opinion in this case that discovery was closed. (Order, Feb. 6, 2020, p. 7-8).

Complainants' proposed reply should be rejected because Complainants wrongly suggest that the Board ordered a reopening of discovery in its orders. The Board's April 16, 2020 Opinion does not order any re-opening of discovery. Instead, under the heading "ORDER", the Board "directs the parties and the hearing officer to proceed expeditiously to hearing on remedy." (Order, April 16, 2020, p. 6, ¶2). The only mention of discovery in the April 16, 2020 Order is a vague reference in dictum citing to the Board's Feb. 6, 2020 Opinion. (Order, April 16, 2020, p. 2). But the Board's February 6, 2020 Opinion does not state that discovery is reopened, nor does it direct anyone to proceed to discovery for the remedy hearing. The Board's February 6, 2020 Opinion only states in its "ORDER" that the Board "directs the parties and the hearing officer to proceed expeditiously to hearing on remedy." (Order, Feb. 6, 2020, p. 17, ¶4). The Board's only reference to discovery in the February 6, 2020 Opinion is that discovery was closed in this matter. (Order, Feb. 6, 2020, p. 7-8).[3]

Complainants' citations to Hearing Officer orders in support of their incorrect claim that discovery is "open" are disingenuous, at best. During discussions about the discovery schedule,

[3] "The Board is aware that MWG was submitting the appropriate quarterly monitoring reports to IEPA for the three stations *until the close of discovery in this matter*." (emphasis added). *Id.*

MWG has consistently asserted that discovery would only be updated to provide new information. In fact, the schedule agreed upon by the parties provides that the parties would simply identify and update their *prior* written discovery requests, with only five additional written requests. The Hearing Officer's only order regarding discovery agreed to this limitation. (Hearing Officer Order, March 30, 2020). At all status hearings, MWG made it clear to the Hearing Officer and the Complainants that since discovery was completed in April 2017, MWG would agree to update its responses. MWG memorialized its objections to the wholesale reopening of discovery in its March 23, 2020 email to the Hearing Officer, attached as Exhibit A to Complainants' motion. Discovery on remedy was already conducted and there is no basis for re-doing that substantial effort.

IV. Consideration of Prejudice to the Non-Moving Party is Broad

Complainants' motion for leave to file a reply should be denied because it merely repeats their incorrect limitation of the definition of "prejudice." As an initial matter, Complainants' repeated focus on "prejudice" ignores the fact that under Illinois Supreme Court Rule 213, it is immaterial whether there is prejudice or not. Rule 213 requires the mandatory disclosure of expert opinions. Expert opinions were issued in this case, for both liability and remedy. Illinois courts applying Rule 213 only allow the substitution of experts for legitimate reason (such as death of an expert). See MWG Response, p. 4-5. In those few cases where a substituted expert is allowed, that new expert is limited to the original expert's opinions.[4] See MWG Response, pp. 12-14. The requirements under Illinois Supreme Court Rule 213 must be strictly followed, and it is reversable error to consider the absence of prejudice of the non-moving party in allowing new expert opinions. *Seef v. Ingalls Mem'l Hosp.*, 311 Ill.App. 3d 7, 21-22 724 N.E.2d 115, 126 (1st Dist. 1999).

[4] An expert may "expand upon a disclosed opinion" however the opinions must be a logical corollary to the disclosed opinions. *Morrisroe*, 2016 IL App (1st) 143605, ¶ 37, citing *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 37, 934 N.E.2d 506, 343 Ill. Dec. 182 (1st Dist. 2010).

In any case, Complainants incorrectly claim, in their motion and again in their proposed reply, that the issue of prejudice to the non-moving party concerns only the timing before trial. Again, Complainants' proposed reply does not address anything new and should not be permitted. Illinois Supreme Court Rules and Illinois authority do not support Complainants' limited definition of prejudice. The purpose of the discovery rules and the strict requirements to follow them is to prevent surprise to the non-moving party or strategic gamesmanship by the parties. *Morrisroe v. Pantano*, 2016 IL App (1st) 143605, ¶ 37 (1st Dist. 2016). ("The purpose of discovery rules, governing the timely disclosure of expert witnesses, their opinions, and the bases for those opinions, is to avoid surprise and to discourage strategic gamesmanship amongst the parties."). Case law is clear that the strict requirements for expert opinions and testimony are necessary to prevent unfair prejudice or the deprivation of a party's ability to prepare adequately a case through no fault of their own. *Clayton v. Cty. of Cook*, 346 Ill. App. 3d 367, 378, 281 Ill. Dec. 854, 864, 805 N.E.2d 222, 232 (2004). The strict requirements for expert discovery "permits litigants to rely on the disclosed opinions of opposing experts and to construct their trial strategy accordingly." *Firstar Bank v. Peirce*, 306 Ill. App. 3d 525, 532 (1st Dist. 1999). By filing their motion to replace their experts and their leave for a reply, Complainants are attempting to take advantage of the post-discovery bifurcation order to entirely switch gears on their legal strategy and to place an unnecessary discovery burden on MWG, all to MWG's disadvantage.

MWG constructed its trial strategy with the knowledge that the opinions issued by Kunkel and Schlissel, and opposed by MWG's experts, would remain. If Complainants are allowed to entirely change their experts and expert opinions, MWG would not be able to adequately prepare its case, through no fault of its own, because the discovery testimony and hearing testimony it

developed will no longer be useful, relevant or adequate for MWG to present its case.[5] For example, at the hearing Kunkel testified that there are no potable wells downgradient from any of the MWG wells and that the groundwater at MWG's stations have no impact on offsite drinking water. 10/27/17 Hearing Tr. p. 181:4-182:7. He also agreed that fly ash and bottom ash are not hazardous. 10/27/18 Hearing Tr. p. 178:10-15. Kunkel further testified that since the groundwater sampling began at Joliet 29, boron has only been detected above the groundwater Class I standards at Joliet 29 in one of the eleven wells in 2011 and never since, and that the concentrations of certain constitutes at the Joliet 29 Station were decreasing. 10/27/17 Hearing Tr. p. 246:4-250:20, 254:2-6. Similarly, Kunkel agreed that the concentrations at wells downgradient of the Former Ash Basin at the Powerton Station were below the Class I standards. 10/27/17 Hearing Tr. p. 210:16-22. Kunkel also agreed that the engineered underdrain system installed in the Secondary Basin at the Powerton Station was designed to quickly move water away from the HDPE liner, protects the liner, and prevents uplift into the liner. 10/27/17 Hearing Tr. p. 108:24-109:9. Finally, Kunkel agreed that "the total recoverable and dissolved are the same for all practical purposes." 10/26/18 Afternoon Hearing Tr. p. 71:10-14. All of these conclusions and opinions go to the absence of gravity of the violations, the reduced duration and reduced severity of the violations, and MWG's due diligence to comply – the very issues that will be considered at the next hearing. MWG would be highly prejudiced if Complainants were allowed to substitute their expert who will have new opinions different than those established in the first hearing.

V. Conclusion

The Hearing Officer has a duty to "to conduct a fair hearing, … and to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code

[5] The 40-page excerpt of Kunkel's deposition attached to MWG's Response demonstrates that MWG conducted its discovery to address the issue of remedy at MWG's stations.

101.610. Allowing Complainants to continue to argue that they should be entitled to substitute experts -- without any basis, long after discovery on remedy issues was closed, and after MWG elicited specific testimony on remedy issues -- does not result in a fair process or an accurate record. The record for the remedy hearing will be adversely affected because many of the elements to be addressed have already been established in the liability hearing. Allowing substitution now will result in serious inconsistencies in the record and will foil any attempt at administrative economy, which is the purpose of bifurcation. For the foregoing reasons, MWG requests that Complainants' proposed reply memorandum be rejected. In the alternative, MWG requests that the Hearing Officer grant it leave to file a sur-reply.

Respectfully submitted,

MIDWEST GENERATION, LLC.

By ____/s/ Kristen L. Gale_____
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