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 Objection to Complainants' Application for Non-Disclosure, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: June 15, 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 for Respondent Midwest Generation, LLC's Objection to Complainants' Application for Non-Disclosure was filed on June 15, 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 June 15, 2020 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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	)	
Complainants,	)	
v.	)	PCB No-2013-015 (Enforcement – Water)
MIDWEST GENERATION, LLC,	)	
Respondent.	)	

MIDWEST GENERATION, LLC'S OBJECTION TO COMPLAINANTS' APPLICATION FOR NON-DISCLOSURE

Midwest Generation, LLC ("MWG") objects to Complainants' application for non-disclosure of the Affidavit of Faith E. Bugel Regarding Expert Witness ("Affidavit") because Complainants have withheld Affidavit from MWG and waived any privilege by placing the information at issue. The purpose of designating information as non-disclosable information is to prevent *the public* from accessing documents, not a party to the proceeding. Complainants' submission of the Affidavit to the Hearing Officer (and ultimately the Board) in support of their motion to substitute experts is an *ex parte* communication, in violation Illinois law and Illinois Pollution Control Board ("Board") rules, due process, and MWG's fundamental right to a fair proceeding.

MWG does not object to maintaining the confidentiality of the Affidavit pursuant to the Agreed Protective Order between the parties in order to protect it from public disclosure, as long as the Affidavit is shared with MWG. Complainants cannot claim that that the Affidavit is protected by the attorney work product doctrine and privileged against introduction in a judicial

proceeding because the work product doctrine is limited to preventing disclosure in the context of discovery. Once Complainants attached the Affidavit as support for their motion and memorandum, Complainants placed the information in the Affidavit "at issue," waiving any work product protection.

I. Brief Background

When discovery began, Complainants and MWG (the "Parties') entered into an Agreed Protective Order for sharing confidential information. The Parties have been operating under that Agreed Order without issue since its entry and have shared confidential information by marking it as "non-disclosable information." On April 1, 2020, Complainants filed a motion with the Hearing Officer requesting that they be allowed to substitute both of their expert witnesses. For one of the expert witnesses, Dr. James Kunkel ("Kunkel"), Complainants did not provide a basis for their request for substitution other than that he was not a "best-placed" expert for the hearing on remedy. On April 15, 2020, MWG filed a response and objection to Complainants' motion because allowing a wholesale replacement of all of the experts at such a late stage in the litigation -- with no basis and no limitation on the scope of the new expert opinions -- violates Illinois Rules of Civil Procedure and would be highly prejudicial to MWG. All discovery related to liability and remedy is complete, and MWG developed testimony at the hearing and constructed its trial strategy with the knowledge that the opinions issued by Complainants two current experts would remain.

On May 22, 2020, the Hearing Officer ordered Complainants to explain why their expert, Kunkel, needed to be replaced, why a substitute expert would be better placed, and explain whether the substitute expert testimony would be inconsistent with or contradict Kunkel's existing testimony and opinions.[1] On June 1, 2020, Complainants submitted the Affidavit of Faith Bugel

[1] The Hearing Officer clarified in an email that "testimony" included the written opinions, deposition testimony, and testimony at hearing.

to explain why Kunkel purportedly needed to be replaced, but refused to provide the Affidavit to MWG. Complainants mistakenly assert that the Affidavit is non-disclosable information *as to MWG* based on a misplaced claim of attorney work-product. On June 9, 2020, MWG objected to this wholly improper procedure by filing MWG's Response to Complainants' Memorandum Regarding Replacement of their Expert. Complainants' decision to withhold the Affidavit from MWG, yet provide it to the Hearing Officer as the basis for a motion, is a blatant *ex parte* communication in violation of Illinois law and Board rules. Complainants cannot disguise their *ex parte* communication as "non-disclosable information."

II. Designation of Non-Disclosable Information is to Prevent Disclosure to the *Public*, Not Disclosure to Other Parties

The purpose of designating material as non-disclosable information is to prevent the public from viewing information, not prevent a party to the proceeding from viewing the material. There is no authority or rule that allows Complainants to withhold the Affidavit from MWG.

The Board's authority to designate material as non-disclosable information is governed by sections 7 and 7.1 of the Illinois Environmental Protection Act ("Act") and implemented by Section 101.130 of the Board regulations. 415 ILCS 5/7, 7.1, 35 Ill. Adm. Code 101.130. Pursuant to the Act and Board rules, trade secrets and other non-disclosable information submitted to the Board and Illinois EPA may be protected from public disclosure. However, the Act and Board regulations do not allow a party to withhold the material from the other parties in an adjudicative matter. As discussed further below, refusing to allow a party access to a document used in deliberation results in an impermissible *ex parte* communication.

In cases where the Board granted a party's request that information be designated as non-disclosable information, the Board specifically states that the information will be prevented from *public* disclosure. In *People v. Freeman United Coal Mining, LLC*, PCB 10-61, 11-02 2013 Ill. ENV LEXIS 281 (Ill. Pollution Cont. Bd. September 5, 2013), the respondent requested that its

confidential business information be treated as non-disclosable information. Initially, the other parties, which included several of the Complainants in this case, objected because they were concerned that the hearings would not be open to the public and asked that "any protective order accommodate reasonable preparation for hearing." *Id.* at *5. In designating the information as non-disclosable, the Board specifically stated that its decision "in no way limits the parties' ability to bring motions to the hearing officer or the Board regarding the specific use of the materials at hearing or during discovery; rather the Board's decision will protect the materials from disclosure to persons not a party to this proceeding. *Id*. at *8. (emphasis added). Similarly, in *In the matter of: Petition of Greif Packaging,* PCB AS11-01 *LLC,* 2012 Ill. ENV LEXIS 144 at *7 (Ill. Pollution Cont. Bd. April 5, 2012), the Board granted the request that certain information be designated as non-disclosable information, and stated that the information "will continue to remain protected from public disclosure in accordance with 35 Ill. Adm. Code 130." *Id.* (emphasis added). The Board did not prevent the other party, the Illinois Environmental Protection Agency, from viewing the documents. *Id.*

Here, Complainants' request is far beyond what is allowed under the Board rules and the Act. Complainants have asked the Board to enter an order preventing the disclosure of the Affidavit from MWG, the Respondent, as well as the public – while at the same time asking the Board and/or Hearing Officer to rely on the information in support of a motion. Complainants provide no support or authority for this unprecedented request. The Board cannot grant Complainants' request to bar MWG from viewing the Affidavit because to do so would sanction an *ex parte* communication.

III. Complainants Cannot use the Non-Disclosure Rules to Engage in an Impermissible *Ex Parte* Communication

Complainants' submission of the Affidavit only to the Hearing Officer and not MWG is an *ex parte* communication that is impermissible on its face. Allowing Complainants to abuse the

non-disclosable information process and withhold the Affidavit while relying upon the Affidavit in support of their petition to replace their expert after discovery is closed is a violation of due process and MWG's fundamental right to a fair hearing. The Board rules define *ex parte* communication as "any written or oral communication by any person that imparts or requests material information or makes a material argument regarding potential action concerning regulatory, quasi-adjudicatory, investment or licensing matters pending before or under consideration by the Board."[2] 35 Ill. Adm. Code 101.202. Pursuant to Illinois law and Board rules, the Hearing Officer "must not engage in an *ex parte* communication designed to influence their action regarding an adjudicatory, regulatory, or a time-limited water quality standard proceeding pending before or under consideration by the Board." 35 Ill. Adm. Code 101.114(c).[3] Further, when a Board employee receives an *ex parte* communication from a party, the Board employee in consultation with the Board's ethics officer, "will promptly memorialize the communication and make it part of the record of the proceeding." 35 Ill. Adm. Code 101.114(e), 5 ILCS 430/5-50 (b-5) (emphasis added).

The bar against *ex parte* communication is founded upon the fundamental right of due process. "Due process requires a fair trial before a fair tribunal whether it is a court or an administrative agency performing an adjudicatory function." *Dombrowski v. City of Chicago*, 363 Ill. App. 3d 420, 426 (2005) (citing *Arvia v. Madigan*, 209 Ill. 2d 520, 540 (2004)). "Basic notions of fair play require that parties have an opportunity to cross-examine, explain or refute facts which form the basis for an administrative agency's adjudication." *Caterpillar Tractor Co. v. Pollution Control Board*, 48 Ill. App. 3d 655, 661 (1977). An administrative agency cannot base its decision

[2] This definition is copied from the Illinois law on *ex parte* communications, located at 5 ILCS 430/5-50.
[3] Similarly, Illinois judges are barred from considering *ex parte* communications. Rule 63 of the Illinois Supreme Court Rules, under the Code of Judicial Conduct, states that "a judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding."

upon facts, data, and testimony which do not appear in the record. *North Shore Sanitary District v. Pollution Control* Board 801, 277 N.E.2d 754, 757 (1972). The administrative agency's findings "must be based on evidence introduced in the case, and nothing can be treated as evidence which is not introduced as such because due process of law requires that all parties have an opportunity to cross-examine witnesses and to offer evidence in rebuttal." *Novosad v. Mitchell*, 251 Ill. App. 3d 166, 174 (quoting *Hazelton v. Zoning Board of Appeals*, 363 N.E.2d 44, 47 (1977)). Any decision influenced by extraneous considerations must be set aside. *Metropolitan Sanitary District v. Pollution Control Board*, 338 N.E.2d 392, 395 (1975).

Complainants' affidavit allegedly explaining why they believe their expert needs to be replaced is clearly an *ex parte* communication made to the Hearing Officer, outside the presence of MWG, in an effort to sway his decision when considering Complainants' motion. Complainants are abusing the Board regulations for non-disclosable information by seeking to disclose to the Hearing Officer (and ultimately the Board) the purported basis for a new expert but withholding that same information from MWG. It is MWG's right to review the Affidavit and basic notions of fair play require that MWG be allowed to respond to the Affidavit submitted to the Hearing Officer. Complainants cannot cite any authority to support their claim that a movant may withhold from the non-movant information used in support of a motion – and no such authority exists because of the express rules against *ex parte* communications.

IV. By Creating the Affidavit and Placing it at Issue, Complainants Waived any Work Product Protection

Complainants' attempt to justify their *ex parte* communication by asserting attorney work product fails because by creating the Affidavit and placing it at issue, Complainants waived any protection. The attorney work product doctrine applies to disclosure of material during discovery, not when a document is used in support of a motion to a decision-maker. The protection of attorney

work product is waived when the information is "at issue" and is used as evidence in a judicial proceeding.

Complainants cannot apply a discovery rule to withhold the Affidavit from MWG after submitting the Affidavit to the Hearing Officer and Board as part of this proceeding. The Illinois Supreme Court General Discovery Rule regarding protection of attorney work product specifically states that "[m]aterial prepared by or for a party in preparation for trial **is subject to discovery** only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." Ill. S. Ct. R. 201(b)(2) (emphasis added)). Every case cited by Complainants in their Application regarding attorney work product involves a discovery dispute and whether a party may be compelled to disclose in discovery information it claims is privileged.[4] None support the notion that a party may withhold from the opposing party a document attached to a motion *as evidence* submitted to a decision-maker. In fact, the only time the Board has considered whether a document is privileged against introduction in a judicial proceeding, the Board found that because the document was privileged from discovery under the attorney-client privilege, it was also protected from public disclosure under Section 7(a)(2) of the Act. *Illinois EPA v. Celotex Corp.*, PCB 79-145, 1984 Ill. ENV LEXIS 568 (Dec. 6, 1984).

While the Board and/or the Hearing Officer may certainly review information *in camera* during a discovery dispute, that information, if found to be privileged, is never made part of the record and is never considered in deliberations of a motion or other substantive issue. Here,

[4] *King Koil Licensing Co. v. Harris*, 84 N.E.3d 457 (Ill. App. Ct. 1st. Dist. 2017) (Motion to compel denied discovery of work product); *Consolidation Coal Co. v. Bucyrus-Erie Co*., 432 N.E.2d 250, 253 (Ill. Sup. Ct. 1982) (Motion to Compel material claimed as work product in discovery); *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc*., 727 N.E.2d 240, 246 (Ill. Sup. Ct. 2000) (Motion to compel discovery of work product denied); *People v. Spiezer*, 735 N.E.1017 (2nd Dist. 2000) (Motion to compel disclosure of non-testifying expert denied). Complainants also impermissibly cited *McCombs v. Paulsen*, 2013 WL 2153956 (Ill. App. Ct. 3d Dist. 2013) and *Huebner v. Family Video Movie Club, Inc.*, 2019 IL App (5th) 180215-U (5th Dist. June 5, 2019), which were both filed under Supreme Court Rule 23, and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1). In any case, in both, the Court was deciding a motion to compel the disclosure of documents in response to discovery. *Id*.

Complainants want the Affidavit to be considered in support of their motion yet want to withhold it from MWG as work product. In addition to engaging in an *ex parte* communication, Complainants waived any alleged privilege by placing the information at issue.

As soon as Complainants attached the Affidavit to their memorandum in support of their motion, Complainants placed the Affidavit "at issue" and waived any claims of privilege. When a claimed privileged document is placed "at issue" by the party who is a holder of the privilege, the privilege is waived. *Waste Management, Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322 (1991). In *Waste Management*, the Supreme Court held that information otherwise protected as attorney work product is none the less discoverable when the information concerns an underlying issue of the case. *Id.* at 331. Following *Waste Management*, courts have routinely ordered parties to disclose attorney work product when the work product becomes "at issue." *Western States Ins. Co. v. O'Hara*, 357 Ill. App. 3d 509, 520 (4th Dist. 2005) (Because the good faith nature of the settlement was "at issue," the privileged communications and attorney work product were discoverable); *Daily v. Greensfelder, Hemker & Gale, P.C.*, 2018 IL App (5th) 150384, ¶35 (5th Dist. 2018) (Court held that attorney work product was discoverable because it was the basis of a party's defense).

Here, Complainants created a document to support their motion, and then requested that the very document they created and presented to influence the decision-maker be protected from disclosure as work product. If such a procedure was allowed, every attorney could abuse the judicial system by "creating" work product that it submits to a decision-maker for consideration but hides away from the opposing party. Complainants' proposed procedure simply flies in the face of due process and avoidance of unfair surprise. The reason for *ex parte* rules is to prevent such abuse. Complainants argue that it is necessary for Ms. Bugel's mental impressions in the Affidavit to be shared with the Hearing Officer in order to support their Memorandum, confirming

that the contents of the Affidavit are at issue in Complainants' motion. Once Complainants attached the Affidavit to their memorandum and used it to support their motion for substitution, Complainants placed the Affidavit "at issue" and waived any claims of privilege. Without the work product protection, the Affidavit no longer qualifies as non-disclosable information and the Board must reject Complainants' request to designate the Affidavit as non-disclosable.

V. Conclusion

By attaching the Affidavit to their memorandum in support of their motion, but withholding that Affidavit from MWG, Complainants have engaged in impermissible *ex parte* communication. The applicable rules governing *ex parte* communications require that the Affidavit be disclosed to MWG. Moreover, while MWG agrees that the Affidavit may be protected from *public* disclosure pursuant to the Agreed Protective Order, Complainants' claim that the Affidavit is non-disclosable information because it is attorney work product fails because they waived that protection when they placed the Affidavit at issue in this proceeding. MWG requests that the Board deny Complainants' application for Non-Disclosure of the Affidavit.

Respectfully submitted,
Midwest Generation, LLC

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