

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,)	
)	
Respondents)	

COMPLAINANTS’ MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF MOTION *IN LIMINE* TO EXCLUDE EXPERT TESTIMONY OF DAVID CALLEN

1. Pursuant to Section 101.500(e) of the Pollution Control Board General Rules, and as supported by the accompanying proposed Reply Brief, Complainants Sierra Club, Inc., Environmental Law and Policy Center, Prairies Rivers Network and Citizens Against Ruining the Environment (collectively, “Citizens Groups”) move the Illinois Pollution Control Board for leave to reply to Midwest Generation, LLC’s (“MWG’s”) Response to Citizen Groups’ Motion *In Limine* to exclude certain testimony by Respondent’s controlled expert witness David Callen. As grounds for the motion, Complainants state as follows:

2. The Board may allow parties to file replies where those replies would aid the Board in its consideration of the relevant factual and legal issues. *American Disposal Services of Illinois, Inc. v. Mclean County, et al.*, PCB 11-60 at 2 (Oct. 16, 2014) (J.D. O’Leary) (allowing a reply “[i]n the interest of administrative efficiency and to aid in the consideration of the issues presented”). In particular, reply briefs should be allowed where “material prejudice

will result for respondents if the reply is not allowed.” *Sierra Club v. Ameren Energy Medina Valley Cogen, LLC, et al.*, PCB 14-134 at 4 (Nov. 6, 2014) (D. Glosser) (allowing a reply where necessary to respond to “substantial arguments” raised in opposition).

3. Material prejudice can result from mischaracterizations by the opposing party of relevant issues to the motion. *City of Quincy v. Illinois Env. Prot. Agency*, PCB 08-86 at 2-3 (June 17, 2010) (T.E. Johnson) (holding that material prejudice may result from being unable to respond to alleged mischaracterizations by the other party). This material prejudice can result from both “factual and legal misrepresentations.” *Johns Manville v. Illinois Dep. of Transportation*, PCB 14-03 at 2 (Sept. 4, 2014) (J.A. Burke); see *Prairie Rivers Network, et al. v. Illinois Env. Prot. Agency, et al.*, PCB 14-106 at 2 (Dec. 18, 2014) (J.A. Burke) (noting that misapplication of precedent presents a basis for a reply); *Illinois v. Amsted Rail Company, Inc.*, PCB 16-61 at 1 (Mar. 3, 2016) (J.A. Burke) (granting leave to reply where an opposition brief “cite[d] irrelevant or distinguishable cases”).

4. Even where the chance of material prejudice is low, leave to reply may be granted to avoid even the possibility that such prejudice could result. *Kyle Nash v. Luis Jimenez*, PCB 07-97 at 3 (Aug. 19, 2010) (C.K. Zalewski).

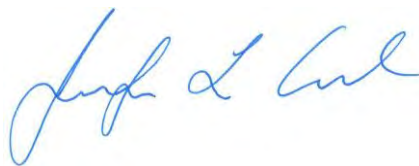
5. Here, as explained in the attached proposed reply brief, Respondent has made multiple legal and factual misstatements in responding to Citizen Groups’ Motion. In particular, Respondent has misapplied existing legal precedent; cited irrelevant and distinguishable cases; and mischaracterized relevant facts to this motion (i.e., the extent of Mr. Callen’s familiarity with and background for reaching the legal conclusions he seeks to present to the Board). The proposed reply brief, in responding to and identifying these errors, will aid the Board in its consideration of the relevant facts and law.

6. The mischaracterizations identified above and in the attached proposed reply brief are significant enough that Citizen Groups would be materially prejudiced if they are not allowed to respond and clarify the record for the Board.

WHEREFORE this Court should grant Citizens Groups leave to file the attached reply brief and consider it before deciding the Motion *In Limine*.

Dated: June 21, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that on June 21, 2016 a true copy of the foregoing *Notice of Filing, Citizens Groups' Motion for Leave to File Reply Brief in Support of Motion In Limine to Exclude Expert Testimony of David Callen* and *Proposed Reply Brief in Support of Motion in Limine to Exclude Expert Testimony* with the Clerk of the Illinois Pollution Control Board:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
100 West Randolph St
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Chicago, IL 60601

And that a true copy of: *Notice of Filing, Citizens Groups' Motion for Leave to File Reply Brief in Support of Motion In Limine to Exclude Expert Testimony of David Callen* and *Proposed Reply Brief in Support of Motion in Limine to Exclude Expert Testimony* were served via electronic mail on June 21, 2016 on the parties listed on the following Service List.



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**PROPOSED REPLY BRIEF IN SUPPORT OF MOTION IN LIMINE
TO EXCLUDE EXPERT TESTIMONY**

Complainants Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network and Citizens Against Ruining the Environment (collectively, “Citizens Groups”) submit this proposed reply memorandum in support of their Motion *In Limine* to Exclude Expert Testimony (“Motion”), which seeks to limit testimony from Respondent’s controlled expert witness, David Callen.

BACKGROUND

On May 20, 2016, Citizen Groups filed the Motion to exclude certain proposed testimony from Mr. Callen based on their conclusion that the targeted opinions do not fall within the scope of permissible expert opinions under the Illinois Rules of Evidence, Rule 702 and therefore are not admissible under Rule 702. The expert opinions that Citizen Groups seek to exclude fall into the following two categories:

■ [REDACTED]

[REDACTED]

[REDACTED]

The Motion alleges that both of these categories of opinions, which pertain to the economic reasonableness of remedies in this case, represent inadmissible legal conclusions.

On June 10, Respondent filed an opposition to the Motion, arguing in part that Mr. Callen's testimony on these topics should be admitted despite drawing legal conclusions because it "would assist the trier in fact." (Resp.'s Response to Compl.'s Mot. (Opp'n) at 6.)

Respondent also argued that Mr. Callen has demonstrated adequate independent knowledge of [REDACTED] to be able to hold himself forth as an expert on

[REDACTED] Neither of these claims is true: Respondent's analysis of what constitutes appropriate expert testimony relies on a misinterpretation of the relevant caselaw, and Respondent's claim that Mr. Callen is qualified to opine on legal matters is belied by Mr. Callen's own testimony.

ARGUMENT

I. The Limited Exceptions Allowing Expert Testimony Relating to Legal Questions Do Not Apply to Mr. Callen's Proposed Testimony in this Case

a. Expert Testimony Interpreting the [REDACTED] Is Not Admissible Because Neither Party Asserts that [REDACTED]

As Citizen Groups explained in the Motion, expert testimony interpreting contracts and insurance policies is normally disallowed because "in the absence of ambiguity contract interpretation is a question of law for which expert testimony would not be appropriate." *Blair*, 358 Ill.App.3d at 338. This rule supersedes the general rule that expert testimony that would assist the trier of fact is admissible. *Id.* In its brief, Respondent identifies a narrow exception to the ban on legal expert testimony, which holds that expert testimony may be admissible "on a

provisional basis for the limited purpose of testing whether a contract is ambiguous.” *Id.* However, Respondent’s reliance on this exception depends on a mischaracterization of the central dispute at hand. Respondent is correct that expert testimony may be admissible to determine that a contract has ambiguous language—and it may even be admissible to resolve that ambiguity—but that is irrelevant here because [REDACTED]

[REDACTED] Respondents have asserted that [REDACTED]

[REDACTED] But the Board may not seek extrinsic evidence to interpret a *complicated* contract—only an ambiguous one. As a result, this exception does not apply, and there is no reason for the Board to accept Mr. Callen’s testimony interpreting [REDACTED]

Furthermore, there is no indication in the record that either party will assert that [REDACTED] [REDACTED] According to the test laid out in *Blair*, “[a] contract term is ambiguous if it can reasonably be interpreted in more than one way due to the indefiniteness of the language or due to it having a double or multiple meaning.” *Id.* at 334. Here, the basis for Mr. Callen’s claim that [REDACTED] is [REDACTED]

[REDACTED] Neither MWG nor Citizens Groups have suggested that [REDACTED]

[REDACTED] Thus, there is no need for the Board to consider extrinsic evidence to [REDACTED]

b. Mr. Callen’s Legal Conclusions Do Not Fall into Any Other Exception to the General Ban on Expert Legal Testimony

Respondent also cites to two additional cases where experts were allowed to resolve

ambiguities in legal documents: *Johns Manville v. Ill. Dept. of Transportation*, PCB 14-3 (Apr. 26, 2016) (B. Halloran), and *KCBX Terminals Co. v. Ill. Env'tl. Prot. Agency*, PCB 14-110, 2014 WL 1757982 (Apr. 28, 2014) (B. Halloran). Neither of those rulings has any relevance to this case. In *Manville*, an expert was allowed to testify regarding how the Illinois Environmental Protection Agency would treat a facility's disposition of waste under the Illinois Environmental Protection Act. *Manville* at 1-3. And in *KCBX*, an expert was similarly allowed to opine that the record presented in a permit application demonstrated compliance with the Illinois Environmental Protection Act. *KCBX* at 2-3. In both cases, the expert testimony involved applying a complex regulatory regime to a specific set of facts, a task which required intensive analysis and interpretation. This is quite different from the case here, where Mr. Callen is purporting to offer legal conclusions based entirely on [REDACTED]. There is no complicated application of facts to a regulatory regime that can justify Mr. Callen's testimony [REDACTED].

In fact, these cases thus look quite similar to the fact pattern in *Blair*, where expert testimony was allowed on the identification and resolution of ambiguous terms. As explained above, there is nothing in the record here to indicate that any such ambiguity exists in [REDACTED].

[REDACTED] As such, neither *Manville* nor *KCBX* provide any basis for allowing Mr. Callen to testify here.

II. Even if Legal Testimony Were Proper Here, Mr. Callen Has Not Demonstrated Independent Legal Expertise Surpassing That of a Layperson

Respondents also mischaracterize the nature and extent of Mr. Callen's familiarity with [REDACTED] and, especially, his familiarity with the legal opinions he intends to provide. Mr. Callen is a financial expert. To the extent he is discussing financial matters

relating to NRG and MWG, Citizen Groups do not contest his expertise. And to the extent Mr. Callen seeks to rely upon [REDACTED]

[REDACTED] Citizen Groups are not seeking to disqualify him. Where, however, his testimony draws legal conclusions from [REDACTED]

[REDACTED] Mr. Callen ventures beyond his areas of expertise. This is especially true when Mr. Callen opines on [REDACTED] and when he relies on [REDACTED]

[REDACTED] that he has not independently reviewed in as much as a year.

In particular, the record demonstrates that Mr. Callen relied on [REDACTED]

[REDACTED] Thus, even were it appropriate for an expert to opine on these legal questions (which, as established above, it is not), Mr. Callen would be the wrong person to provide that testimony.

Respondents seek to demonstrate Mr. Callen's knowledge of [REDACTED] by citing to [REDACTED]

[REDACTED]

[REDACTED] But by Mr. Callen's own admission, the large majority of [REDACTED] are irrelevant to his expert testimony in this case:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Mr. Callen further testified that he did not independently review [REDACTED] instead relying on [REDACTED]

received the email [REDACTED] sent and drawn the same conclusions Mr. Callen drew, so there is no reason to particularly value his testimony on the legal questions presented.

Third and finally, the evidence on the record does not support a conclusion that [REDACTED] contribution to Mr. Callen's conclusions was "minimal" in any way: to the contrary, [REDACTED] provided the conclusion and the citations that form the basis of Mr. Callen's opinions, and he did not independently review their analysis. Callen Dep. Tr. 44:3-24.

CONCLUSION

MWG has stated that Respondent's expert David Callen will provide testimony opining on [REDACTED]

[REDACTED] Both of those opinions are based on legal interpretations and thus constitute impermissible legal conclusions that in any case are far outside his expertise. As such, Citizen Groups' Motion *In Limine* to exclude Mr. Callen's testimony on those points should be granted.

Respectfully submitted,



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