

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: John Therriault, 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 Objection to Complainants' Motion for Leave to Reply (Redacted), copies of which are herewith served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: June 23, 2016

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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 Objection to Complainants' Motion for Leave to Reply (Redacted) was filed electronically on June 23, 2016 with the following:

John Therriault, 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 mailed by First Class Mail, postage prepaid, on June 23, 2016 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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MIDWEST GENERATION, LLC’S OBJECTION TO COMPLAINANTS’ MOTION FOR LEAVE TO REPLY

Pursuant to 35 Ill. Adm. Code 101.500(e), Respondent, Midwest Generation, LLC (“MWG”), by its undersigned counsel, objects to Complainants’ Motion for Leave to Reply to MWG’s Response to Complainants’ Motion *In Limine* to Exclude Expert Testimony of David Callen. Under the Illinois Pollution Control Board’s (“Board”) procedural rules, a reply memorandum will not be allowed except to “prevent material prejudice.” 35 Ill. Adm. Code 101.500(e). Complainants have failed to meet the standard. Complainants split hairs on the definition of terms, proffer no new facts or arguments, and misinterpret Board opinions, without addressing the key issue - that Mr. Callen’s testimony will assist the Board in coming to its decision.

The Board certainly allows replies in certain instances when it believes it needs assistance in consideration of the issues presented.¹ However, the Board has made it clear that when the

¹ The cases cited by Complainants in an effort to support the request for a reply brief are factually distinct and address dispositive motions such as Motions to Dismiss or Motions for summary judgment. Not one of the cases

issues are fully briefed, no reply is necessary. *Roger and Romana Young v. Gilster-Mary Lee Corp.* 2001 WL 725421, 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 Board additional assistance and Complainants fail to establish that they will suffer material prejudice. The only stated basis for Complainants' motion concerns how cited legal cases should be reviewed by the Hearing Officer and Mr. Callen's familiarity with and background for reviewing a financial document. *See* Complainants' Motion for Leave at 2. Complainants' original motion already addressed their argument about Mr. Callen's familiarity with [REDACTED], *See* Complainants' Motion *In Limine* at 9-12, and they present no new information to further support it. *See* Complainants' Motion for Leave, at 2. In fact, Complainants do not cite to any new cases or assert that MWG raised any new argument that requires a reply.

The information already provided to the Hearing Officer is more than sufficient to enable a determination on whether Mr. Callen may rely upon [REDACTED] to support the fact that MWG is an excluded project subsidiary from NRG. Regardless, even if Complainants' believe that their Motion *In Limine* to exclude Mr. Callen's reliance on the [REDACTED] was somehow insufficient, Complainants' proposed reply memorandum provides no new information to cure the purported deficiency. The proposed reply memorandum solely addresses issues that Complainant already addressed at length in their original motion. *See* Complainants' Motion *In Limine* at 9-12.

proffered concern a non-dispositive and relatively simple Motion *In Limine* where Complainants do not establish any prejudice or present new information that would assist the Hearing Officer

Moreover, Complainants' proposed reply memorandum contains significant misrepresentations concerning Respondent's position and the authority Respondent cites in support. Complainants appear to argue that the [REDACTED] is not "ambiguous" and thus does not need an "interpretation" by Mr. Callen. Complainants fail to recognize the purpose of [REDACTED] and how Mr. Callen is using it. Mr. Callen is [REDACTED]

[REDACTED]

[REDACTED]. Notably, Complainants agree that Mr. Callen is a financial expert. *See* Petitioner's Proposed Reply at 4. MWG is baffled at Complainants' argument that a financial expert may not read or rely upon [REDACTED].² Complainant's notion that Mr. Callen must demonstrate an "independent legal expertise" when he is not conducting a legal interpretation is unsupported by any authority, and must be rejected. He is a financial expert reviewing a financial document, as part of his regular duties.

Complainants do not address, because they have no basis, the thrust of MWG's Response to their Motion *In Limine* – that Mr. Callen's testimony will assist the Board in coming to a conclusion in the case. *See* MWG's Response, pp. 4-10. It is undisputed that the appropriate standard in evaluating expert testimony is whether the expert testimony will aid the trier in fact to understand the evidence or determine a fact at issue. Ill. R. Evid. 702.³ That standard is well established by the Board cases cited by MWG. *See Johns Manville v. Illinois Department of*

² MWG also is mystified as to why Complainants have chosen this issue to dispute. [REDACTED] and no attempts to shield the Board from that fact will change it.

³ Complainants' state in their Motion and proposed Reply that the fact at issue is the economic reasonableness of remedies in this case. See Motion at 2 and Proposed Reply at 2.

Transportation, PCB 14-3 (April 26, 2016)(B. Halloran) and *KCBX Terminals Co. v. Illinois Environmental Protection Agency*, PCB 14-110, 2014 WL 1757982, (April 28, 2014) (B. Halloran). Complainants raise no new information or argument on this point. Instead, Complainants merely attempt to argue that the cases are somehow not relevant. Surely, the Hearing Officer will determine the relevancy of cited cases that recite and apply the established standard of expert review.

Complainants argue further that the Board permitted the expert testimony in the *Johns Manville* and *KCBX* orders because each “involved applying a complex regulatory regime to a specific set of facts, a task which required intensive analysis and interpretation.” *See* Complainants’ Proposed Reply, at 4. In both cases, the proffered experts were permitted to testify about their interpretation of the Illinois Environmental Protection Act, a statute the Board operates under and interprets daily. There is no validity in Complainants’ suggestion that the Board needs more assistance in understanding the Illinois Environmental Protection Act than in understanding the terms of a 193-page complex financial document for approximately [REDACTED]. As a financial expert, Mr. Callen will assist the Board in understanding MWG’s business structure and its business relationship with NRG Energy, Inc.

Conclusion

For the foregoing reasons, MWG requests that Complainants' proposed reply memorandum be rejected.

Respectfully submitted,

MIDWEST GENERATION, LLC.

By /s/ Kristen L. Gale
One of Its Attorneys

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