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, 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 Motion *In Limine* to Exclude Sections of Complainants' Expert Report and Expedited Motion for Stay Pending and The Board's Decision and Memorandum in Support along with Non-Disclosable Exhibit (not filed with IPCB), a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: February 10, 2021

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
(312) 251-5255

SERVICE LIST

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Jeffrey Hammons
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601

Keith Harley
Chicago Legal Clinic, Inc.
211 West Wacker Drive, Suite 750
Chicago, IL 60606

Abel Russ
For Prairie Rivers Network
Environmental Integrity Project
1000 Vermont Avenue, Suite 1100
Washington, DC 20005

Faith E. Bugel
Attorney at Law
Sierra Club
1004 Mohawk
Wilmette, IL 60091

Greg Wannier, Associate Attorney
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612

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 Motion *In Limine* to Exclude Sections of Complainants' Expert Report and Expedited Motion for Stay Pending and The Board's Decision and Memorandum in Support along with Non-Disclosable Exhibit (not filed with IPCB) was filed on February 10, 2021 with the following:

Don Brown, 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 February 10, 2021 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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MIDWEST GENERATION, LLC'S MOTION *IN LIMINE* TO EXCLUDE SECTIONS OF COMPLAINANTS' EXPERT REPORT AND EXPEDITED MOTION FOR STAY PENDING THE BOARD'S DECISION

Pursuant to 35 Ill. Adm. Code 101.500 and 101.514, Respondent, Midwest Generation, LLC ("MWGen"), requests that the Illinois Pollution Control Board ("Board") enter an Order granting its combined Motion to Stay and Motion *in Limine* to exclude the sections of Complainants' Expert Opinion of Jonathan S. Shefftz that opine as to MWGen's indirect parent, NRG Energy, Inc. ("NRG"). MWGen is the only party named in the complaint and the only party the Illinois Pollution Control Board ("Board") found to have violated the Illinois Environmental Protection Act ("Act"). Any discussion or opinions concerning NRG are beyond the Board's opinion, not relevant, and must be stricken. Until the Board confirms that the only relevant party is MWGen, the Board should stay any further discovery on this issue pending the Board's review. In support of its Motions, MWGen submits its Memorandum in Support and states as follows:

1. On October 3, 2012, Complainants filed a Complaint against MWGen, and no other party, alleging violations of the Illinois Environmental Protection Act ("Act") and its underlying

regulations. On December 15, 2014, long after NRG acquired MWGen's parent company, Complainants moved to file an Amended Complaint, which still only named MWGen. Neither the Complaint nor the Amended Complaint contain any allegations against or concerning NRG.

2. During the ten days of hearing before the Board on liability, only MWGen was the responsive party, with witnesses from each of MWGen's four facilities testifying.

3. On June 20, 2019, in an Interim Opinion, the Board found that MWGen, and no other party, violated the Act and underlying regulations. The Board modified the Interim Order on February 6, 2020, to correct an interpretation of the law, and MWGen was still the only party the Board found to have violated the Act.

4. On January 25, 2021, Complainants served their expert opinions on MWGen. One of the opinions is titled "Expert Opinion on Economic Benefit and Noncompliance and Economic Impact of Penalty Payment and Compliance Costs" by Jonathan S. Shefftz ("Shefftz Opinion"). The Shefftz Opinion is attached as Exhibit 1.[1]

5. In his opinion, Mr. Shefftz sets out an economic benefit analysis and proposed penalty analysis based in large part on the financial status of NRG, which is not a party to this case.

6. NRG is the indirect parent company of MWGen and also owns, directly and indirectly, hundreds of other subsidiaries worldwide. Neither NRG nor its other related subsidiaries or entities are parties to this matter. Neither NRG nor its other related subsidiaries or entities have been found responsible for groundwater contamination beneath the four Illinois stations operated by MWGen. All the pleadings in this case and all decisions and findings to date name only MWGen, including the Board's Interim Orders on liability.

[1] Because the Shefftz Opinion contains Non-Disclosable Information, it is only attached to the motion submitted to the Illinois Pollution Control Board Clerk, and has not been uploaded to the Board's website.

7. NRG's financial status as an indirect parent company is unrelated to this case and not relevant to any response actions that the Board could impose on MWGen. MWGen is a separate legal entity that operates the four stations at issue in Illinois. Complainants cannot at this late date attempt to circumvent the law of the case and pleading rules by having their expert opine that MWGen's parent company should essentially be a party to the case.

8. Case law supports excluding any information or opinion concerning NRG from the Shefftz Opinion because NRG is not named in this lawsuit and was not found to have violated the Act. In *Johns Manville v. Illinois Dept. of Transportation*, PCB 14-3 *slip op. *4* (Dec. 21, 2017), during the remedy phase of the case, the Board refused to allow respondent IDOT to seek discovery about the financial relationship between the complainant and another party. Although there were allegations that there was a financial connection between the parties for the remedy at issue, the Board did not allow discovery to proceed because the third party had not been found to have violated the Act, was not a party to the lawsuit in front of the Board, and no complaint had been brought before the Board alleging anyone else violated the Act.

9. The Board should also exclude the sections of the Shefftz Opinion that discuss NRG as a parent entity because any assertion of parent liability must be through the pleadings, and not surreptitiously through an expert opinion. *Gass v. Anna Hosp. Corp.,* 392 Ill. App. 3d 179, 185-86, 911 N.E.2d 1084, 1091 (5th Dist. 2009) (A party seeking to apply the exception to the rule of corporate existence must seek the relief in their pleading, and also carries the burden of proving actual identity or a misuse of corporate form).

10. MWGen requests that the Board stay discovery on the economic issues in this case pending the Board's decision on its Motion *in Limine*. While the Hearing Officer has the authority to hear motions related to discovery, under Section 101.514 of the Board's procedural rules, only the

Board may issue a stay in a proceeding. 35 Ill. Adm. 101.514. *See also People v. State Oil Co.*, PCB 97-103 (May 15, 2003), *aff'd sub nom State Oil Co. v. PCB*, 352 Ill. App. 3d 813 (2nd Dist. 2004) (The decision to grant or deny a motion for stay is vested in the sound discretion of the Board.)

11. MWG will suffer irreparable harm if the Board does not stay discovery on the economic issues. *North Shore Sanitary District v. Illinois EPA*, PCB 03-146 (March 20, 2003), *3 (The Board may consider the harm suffered by a movant if a stay is not granted.)

12. Currently, MWGen is required to name its experts and provide the subject area of expert opinions by February 22, 2021. Both the nature and number of experts MWGen identifies will depend on whether the Board strikes NRG from the Shefftz Opinion.

13. Further, if a stay is not issued pending the Board's decision to strike NRG from the Shefftz Opinion, MWGen will be irreparably harmed by being forced to produce detailed economic analyses and opinions about the financial status of NRG, an entity that is not a party to this proceeding. There will be an enormous waste of judicial resources for the parties and for the Board.

14. Before MWGen can identify experts in response to Complainants' claims regarding economic benefit and deterrence, the Board must clarify that MWGen is the only Respondent subject to the Board's June 20, 2019 Order (as amended by the February 6, 2020 Interim Order).

15. MWGen's request for a stay is limited *only* to the expert opinion on economic issues. MWGen is not requesting a stay on discovery on the other issues identified by the Board, thus discovery will proceed on the more complex issues of whether any remedy or corrective action is required at the four MWGen stations.

WHEREFORE, for the reasons stated above, MWGen requests that the Board immediately stay discovery on economic issues pending its review and decision on the Motion *in Limine* to strike NRG from the Shefftz Opinion. MWGen further requests that the Board enter an order excluding the sections of the Shefftz Opinion that refer to NRG, and enter an order barring Jonathan Shefftz or any other expert or witness from opining or testifying about any entity other than MWGen.

Respectfully submitted,
Midwest Generation, LLC

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

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
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MEMORANDUM IN SUPPORT OF MIDWEST GENERATION'S MOTION *IN* LIMINE TO EXCLUDE SECTIONS OF COMPLAINANTS' EXPERT REPORT AND EXPEDITED MOTION FOR STAY PENDING THE BOARD'S DECISION

Respondent, Midwest Generation, LLC ("MWGen"), submits this Memorandum in Support of its Motion *in Limine* and related Motion for Stay, requesting that the Illinois Pollution Control Board ("Board") enter an order excluding the portions of the Expert Opinion of Jonathan S. Shefftz ("Shefftz Opinion") that refer to MWGen's indirect parent, NRG Energy, Inc. ("NRG"), and barring any witness from opining or testifying about an entity other than MWGen. In support of its Motions, MWGen states as follows:

A. Brief Background

On October 3, 2012, Complainants filed a Complaint with the Illinois Pollution Control Board ("Board") against MWGen alleging violations of the Illinois Environmental Protection Act ("Act") and its underlying regulations at four of MWGen's Stations in Illinois. In 2013, NRG purchased MWGen's parent company, and MWGen became one of NRG's indirect wholly owned subsidiaries. On December 15, 2014, long after NRG acquired MWGen's parent company,

Complainants moved to file an Amended Complaint, which still *only* named MWGen.[2] Neither the Complaint nor the Amended Complaint contain any allegations against or concerning NRG. Further, since 2012, MWGen has continued to own and operate the four stations that are the subject of the Complaint and Amended Complaint.

Following extensive discovery concerning the four stations operated by MWGen, and a ten-day hearing where witnesses for MWGen testified about operations of the stations, on June 20, 2019, the Board issued an Interim Opinion, finding that MWGen violated the Act and underlying regulations. The Board also ordered the Hearing Officer to hold additional hearings to determine the appropriate relief and any potential remedy as to MWGen in consideration of Sections 33(c) and 42(h) of the Illinois Environmental Protection Act ("Act"). 415 ILCS 5/33(c), 42(h). On MWGen's motion, the Board modified the Interim Order on February 6, 2020 to correct an interpretation of the law, again naming only MWGen. Since the Complaint was filed in 2012, MWGen has been the only Respondent in this matter, and the only entity the Board found to be the responsible party under the Act.

Following the Board's June 20, 2019 and February 6, 2020 Interim Orders, the Hearing Officer entered a discovery schedule on October 19, 2020, that included dates to identify experts and provide expert opinions. Pursuant to that schedule, on January 25, 2021, Complainants issued their experts' reports. One of the opinions was the "Expert Opinion on Economic Benefit and Noncompliance and Economic Impact of Penalty Payment and Compliance Costs" by Jonathan S. Shefftz ("Shefftz Opinion"), attached as Exhibit 1.[3] The Shefftz Opinion purportedly calculates an economic benefit and proposes a penalty analysis. However, the analysis is primarily based upon

[2] Complainants' Motion to Amend the Complaint was granted on February 19, 2015.
[3] Because the Shefftz Opinion contains Non-Disclosable Information, it is only attached to the motion submitted to the Illinois Pollution Control Board Clerk, and has not been uploaded to the Board's website.

the financial status of MWGen's indirect parent, NRG. Complainants have not named NRG in their Complaint nor in the Amended Complaint, and NRG has never been a party to this matter. Moreover, the Board made no findings as to NRG, issuing its June 20, 2019 Interim Order and its February 6, 2020 Interim Order as to MWGen only.

B. Information Regarding Any Party Other Than MWGen is Not Relevant and Must be Excluded

The only party the Board found to be responsible under the Act is MWGen. Accordingly, the only information that is relevant, discoverable, and may be presented to the Board for the next hearing is information about MWGen. In a case with a similar procedural posture to this case, the remedy phase, the Board held that discovery is limited to the party found to be in violation of the Act. In *Johns Manville v. Illinois Dept. of Transportation*, the Board found that the Illinois Department of Transportation ("IDOT") had violated the Act, and ordered a second hearing to determine the appropriate relief. *Johns Manville v. Illinois Dept. of Transportation*, PCB 14-3 (December 15, 2016). During discovery in preparation for the second hearing, IDOT requested information about financial payments between the complainant, Johns Manville, and another company, (ComEd) for remediation at the Johns Manville Site. *Johns Manville v. Illinois Dept. of Transportation*, PCB 14-3, (Dec. 21, 2017). Johns Manville objected and requested that the Board issue a protective order on the grounds that the information IDOT was related to a separate entity and was not relevant. The Board agreed. The Board stated that "the only one found to have violated the Act is IDOT" and it had not found anyone else to have violated the Act. *Id.* at *4. The Board further stated that no complaint had been brought before the Board alleging anyone else violated the Act. *Id*. Because the information about the financial relationship with another company was not relevant nor would lead to relevant information, the Board granted Johns Manville's motion for protective order and barred IDOT's request for information related to a party unassociated with

the matter. *Id*. at *4-5. The parallels between the instant case and the Johns Manville case are evident. Just as in this case, liability had already been determined in the Johns Manville case and the parties were in the remedy stage. Just as in this case, a party sought to present information about the financial relationship of a third party, not named in the case, arguing that the discovery related to the amount of the remedy. The Board should reach the same conclusion here as in Johns Manville and find that information concerning a third, unnamed party − NRG − are not relevant to a potential remedy concerning MWGen.

This is the case even when the third, unnamed party is a parent corporation. The Board has held that only information related to the respondent, and not its parent, is relevant in evaluating an appropriate penalty. In *Charter Hall Homeowner's Assoc. v. Overland Transportation System, Inc*., the complainant argued that the Board, in evaluating the penalty against respondent, should consider the financial status of the respondent's parent corporation as part of the analysis. *Charter Hall Homeowner's Assoc. v. Overland Transportation System, Inc*., PCB 98-81, *slip op.* at 14 (May 6, 1999). The Board rejected that suggestion, stating that complainants had not established that the parent company, which was not a party to the matter, was responsible for the violations, and thus had not demonstrated that the information was relevant. *Id.*

The Board's decisions in both the *Johns Manville* matter and in the *Charter Hall Homeowner's Assoc.* matter are supported by Illinois Supreme Court Rule 201(b)(1) which limits the scope of discovery to the actual issues in the case and the subjects of the pending action Pursuant to that rule, the Illinois Supreme Court has held that "[i]t is axiomatic that 'discovery should only be utilized to 'illuminate the actual issues in the case.'" *Sander v. Dow Chem. Co.*, 166 Ill. 2d 48, 64, 209 Ill. Dec. 623, 631 (1995) *quoting Owen v. Mann*, 105 Ill. 2d 525, 530 (Ill. 1985). The Illinois

Supreme Court further stated that the pleadings and defenses in a lawsuit determine the appropriate scope of relevant discovery. *Sander,* 166 Ill.2 at 64. .

Here, the issues in this phase of the case are to determine the whether the named Respondent, MWGen, is required to implement any potential remedy in consideration of Sections 33(c) and 42(h) of the Illinois Environmental Protection Act ("Act"). 415 ILCS 5/33(c), 42(h). Discovery is limited to evaluating the factors under Sections 33(c) and 42(h) against the actions and status of MWGen, and no other party. Any discussions regarding other entities not named in the Complaint and not found to have violated the Act are not relevant. Because the Shefftz Opinion includes information and makes conclusions about NRG, an entity wholly unrelated to this matter, the Board should exclude those portions of the opinion. The Board should also bar Mr. Shefftz from opining or testifying about any entity other than the Respondent, MWGen.

C. Complainants Cannot "Back-Door" A Parent Liability Theory Through Their Expert

Complainants' attempt to insert a parent liability theory through their expert opinion, long after their pleadings were final and liability issues have been decided, is improper and should be barred. It is a generally accepted principle that a parent corporation is not liable for the acts of its subsidiaries. *United States v. Bestfoods*, 524 U.S. 51, 61, 118 S. Ct. 1876, 1884 (1998). Where a party seeks to have a court apply an exception to the rule of separate corporate existence, the party must "seek that relief in their pleading and carry the burden of proving actual identity or a misuse of corporate form which, unless disregarded, will result in a fraud on him." *Gass v. Anna Hosp. Corp.,* 392 Ill. App. 3d 179, 185-86, 911 N.E.2d 1084, 1091 (5th Dist. 2009)(emphasis added). Very simply, Complainants have never pled nor claimed an exception to the rules of parent liability and cannot do so through an expert for the remedy stage of this case. By asserting in the Shefftz

Opinion that MWGen and NRG "are so intertwined" that NRG's finances should be considered, Complainants are improperly trying to make NRG a responsible party.

To apply an exception of the rule of a separate corporate existence, a court is required to either pierce the corporate veil or find a subsidiary is merely an "alter-ego," both of which are high bars, and courts are admonished to undertake the tasks "reluctantly." *Ted Harrison Oil Co. v. Dokka*, 247 Ill.App.3d 791, 795 (1993). Both these questions are complex and factually intensive and have never been raised in this case.[4] Merely showing some overlap between a subsidiary and a parent corporation is insufficient to demonstrate that the subsidiary is the alter-ego of the parent. *Larson v. CSX Transp., Inc.*, 359 Ill. App. 3d 830, 840, 835 N.E.2d 138, 145 (1st Dist. 2005), *See also People of the State of Illinois v. Wayne Berger and Berger Waste Management*, 1999 Ill. ENV LEXIS 175, *20-21, PCB 94-373 (May 6, 1999).

Here, Complainants have made no attempt in any pleading to pierce the corporate veil between MWGen and its indirect parent company, NRG. Complainants have also not attempted to crest the high burden of proving that MWGen is merely the alter ego of NRG through the misuse of corporate form that would give it some advantage. In any case, Complainants are too late to make such an attempt. The Board has already made a finding of liability against MWGen, and cannot now allow Complainants to surreptitiously insert the idea of parent liability for the remedy phase through an expert report.

[4] Piercing the corporate veil analyzes nine factors, including inadequate capitalization, failure to observe corporate formalities, nonpayment of dividends, absence of corporate records, and whether the corporation is merely a facade for the operation of the dominant stockholders. *Id.* The "alter-ego" theory evaluates whether the entities have failed to maintain formal corporate distinctions, or whether recognition of the entities as distinct would allow them some unfair advantage. *Larson v. CSX Transp., Inc.*, 359 Ill. App. 3d 830, 840, 835 N.E.2d 138, 145 (1st Dist. 2005).

D. The Board Should Immediately Stay Discovery on the Economic Issues Pending its Review

The decision to grant or deny a motion for stay is vested in the sound discretion of the Board. *People v. State Oil Co.*, PCB 97-103 (May 15, 2003), *aff'd sub nom State Oil Co. v. PCB*, 352 Ill. App. 3d 813 (2nd Dist. 2004). The Board will grant a stay if a party would suffer irreparable harm without it. *North Shore Sanitary District v. Illinois EPA*, PCB 03-146 (March 20, 2003), *3.

Here, MWGen will suffer irreparable harm in preparing its defense if it is not granted a stay of discovery on the economic issues. Pursuant to the Hearing Officer's discovery schedule, MWGen must identify experts and provide the subject area of expert opinions by February 22, 2021. However, MWGen cannot begin to prepare its expert opinions in response to the Shefftz Opinion until the Board clarifies that that MWGen is the only Respondent subject to the Board's June 20, 2019 Order (as amended by the February 6, 2020 Interim Order). Without a stay, MWGen will be forced to prepare and produce detailed financial opinions about an entity that is not named in this proceeding. Also, a stay pending a clarification by the Board will reduce confusion in the record and limit additional delays. Without a stay, expert opinions will likely be produced that will contain information that is not relevant and require subsequent modification, further extending any discovery at a later date. To reduce confusion and provide clarification to the parties now, the Board should immediately stay discovery on the economic issues.

Notably, MWGen is not requesting a stay on any of the other issues that the Board identified in its June 20, 2019 Order, including expert opinions related to any potential corrective actions that may be required. MWGen's request is solely limited to a stay on the economic issues.

E. Conclusion

Because the Shefftz Opinion contains non-relevant information about NRG, an entity that is not party to this litigation, not named in the Complaint, and not found in violation of the Act by

the Board, the Board must exclude the portions of the Shefftz Opinion that concern NRG, and bar Mr. Shefftz or any other witness from offering an opinion on any entity other than MWGen. MWGen also requests that the Board immediately issue a stay on discovery *solely* on the economic issues pending its decision on this motion.

Respectfully submitted,
Midwest Generation, LLC

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

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
312-251-5255