ILLINOIS POLLUTION CONTROL BOARD
April 13, 2021

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| SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, and CITIZENS AGAINST RUINING THE ENVIRONMENT, | ) | |
| Complainants, | ) | PCB 13-15<br>(Citizens Enforcement – Water, Land) |
| v. | ) | |
| MIDWEST GENERATION, LLC, | ) | |

Respondent.

## HEARING OFFICER ORDER

On February 10, 2021, respondent Midwest Generation, LLC, (MWG), filed a Motion *in Limine* to Exclude Sections of Complainants' Expert Report (Mot. to Exclude) and Expedited Motion for Stay Pending the Board's Decision with Memorandum in Support (Memo) and Non-Disclosable Exhibits attached (Mot. for Stay). Both motions are directed to the Board, and both motions are intertwined. On February 24, 2021, complainants, Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively, Environmental Groups) filed its opposition to both motions. (Oppos.). On March 10, 2021, MWG filed a Motion for Leave to File its Reply to the Environmental Groups Responses.

This order summarizes the filings and then provides my ruling on each motion.

## ABBRIVIATED PROCEDURAL HISTORY

After 10 days of hearings, the Board found that MWG violated the Act and Board regulations as alleged in the complaint and further found that additional hearings were required because the record lacked sufficient information to determine the appropriate relief and any remedy, considering Sections 33(c) and 42 (h) of the Act (415 ILCS 5/33(c) and 42 (h) (2016)). Sierra Club, et.al, v. Midwest Generation, LLC, PCB 13-15 slip op. at 92-93 (June 20, 2019).

After a few agreed discovery extensions, the parties have been proceeding pursuant to the agreed discovery schedule entered by Hearing Officer order dated October 19, 2020.

## MWG's Motions

### MWG's Expedited Motion and Memorandum for Stay Pending Board's Decision

#### Summary of MWG's Motion and Memorandum

MWG request that the Board stay any further discovery regarding economic issues until it decides MWG's "Motion *in Limine* to exclude sections of Complainants' Expert Opinion of Jonathon S. Shefftz that opine as to MWGen's indirect parent, NRG Energy, Inc.". Mot. to Exclude at 1. MWG cites to Section 101.514 of the Board's procedural rules for the proposition that only the Board can grant a stay. Mot. to Exclude at 3-4; Memo at 7.

MWG states that "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." Mot. for Stay at 4; Memo at 7. MWG further states that its "request for a stay is limited only to the expert opinion on economic issues". *Id*.

**Summary of Environmental Groups Response**

Environmental Groups do not disagree with MWG that only the Board can grant a stay, only that MWG's request for stay will fail because "it cannot meet the Board's rigorous standard" to do so. Oppos. at 10.

**Discussion and Ruling**

Both parties are correct that the Board must decide a motion for stay in the first instance. 35 Ill. Adm. Code 101.514 (a). Additionally, motions for expedited review must be directed to the Board, which MWG has done. 35 Ill. Adm. Code 101.512 (a). Therefore, I defer to the Board to decide MWG's Expedited Motion for Stay.

**MWG's Motion To Exclude Sections of Complainants' Expert Report**

While I defer to the Board to decide MWG's Expedited Motion for Stay, all discovery disputes are handled by the hearing officer. 35 Ill. Adm. Code 101.616. Therefore, I bifurcate MWG's motion and decide only its Motion to Exclude.

**Summary of MWG's Motion**

MWG argues that NRG is not a named party and the Board in its interim Opinion "found that MWGen, and no other party, violated the Act and underlying regulations." Mot. to Exclude at 2. MWG states that the complainants served Jonathan Shefftz expert opinion where he "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." *Id.*

MWG cites to Johns Manville v. Illinois Dept. of Transportation, PCB 14-3 slip op. at 4 (Dec. 21, 2017), where "the Board refused to allow respondent IDOT to seek discovery about the financial relationship between complainant and another party" not named in the complaint. *Id*. at 3; Memo at 3-4. MWG points out that Johns Manville objected, and the Board agreed, to IDOT's requested information about the financial arrangement between Johns Manville and

ComEd because it was not relevant and was related to a separate entity. Memo at 3. MWG also cites to the Board's opinion in Charter Hall Homeowner's Assoc. v. Overland Transportation System, Inc. PCB 98-81, slip op. at 14 (May 6, 1999), in support of its argument that the Board does not "consider the financial status of respondent's parent company as part of its [remedy] analysis". Memo at 4.

MWG argues that the Board's decisions in Johns Manville and Charter Hall Homeowner's Assoc. make clear that that "[b]cause the Shefftz Opinion includes information and makes conclusions about NRG, an entity wholly unrelated to this matter," is not relevant and therefore must be excluded. Memo at 5.

Finally, MWG argues that complainants cannot now proceed with parent liability theory without the issue ever being raised and "cannot do so through an expert for the remedy stage of this case". *Id*. Citing cases in support, MWG argues that the courts are hesitant to apply an exception to the rule of separate corporate existence, which allows a party to pierce the corporate veil or "find that a subsidiary is merely an alter ego"- where the issue has never been raised in this case. Memo at 6.

**Summary of Environmental Groups Response**

Complainants argue that MWG's claims are without merit and that the courts and the Board have "confirmed that it is appropriate, when considering the economic impact of a proposed remedy, to consider the full context of a respondent's access to capital up to and including such access resulting from its relationship with a corporate parent". Oppos. at 1. Complainants state that both MWG's finances and NRG's finances are relevant to Section 42 (h) of the Illinois Environmental Protection Act (Act). *Id*. at 2. In support, complainants state that NRG and MWG are "inseparably intertwined" because based on the Shefftz Report, NRG pays all MWG workers directly and provides an employee savings plan. *Id*. at 6-8. "[I]n other words, NRG employees make all of MWG's major operational decisions; they determine its corporate strategy, they pay its taxes, they make compliance decisions, and they decide how to allocate profits". *Id*.

Complainants cite to the Board's decision in People v. Panhandle Eastern Pipe Line Company, PCB 99-191, (Nov. 15, 2001), in support of their argument that the Board has found a parent company finances relevant when considering Section 42 (h) factors. *Id*. at 2-4. Complainants further state that the Board's decision in Panhandle follows other courts and administrative decisions in determining appropriate remedies. For instance, complainants cite to United States v. Union Twp., 150 F.3d 259 (3d Cir. 1998), where the parent corporation financials were considered only after the ability to pay issue was present. The Appeals Court noted that "the reference to defendant's financial statement merely assured that the penalty would not be set at a level above defendant's ability to pay." *Id*. at 268. The Appeals Court further noted that "the district court only considered [the parent company's] assets as one factor among others; they were not dispositive." *Id*. at 268.

Next, the Environmental Groups distinguish the Board's decision in Johns Manville v. Illinois Department of Transportation, PCB 14-3, (Dec. 15, 2016) and relied on by MWG, and

argue the issue Johns Manville involved a question of a third-party (ComEd), not a parent company, and its reimbursement to Johns Manville. The Board found that any financial arrangement that Johns Manville had with ComEd was not relevant. *Id*. at 4-5.

Complainants then argue that MWG misconstrues the Board's decision in Charter Hall. The complainants argue that "Charter Hall does not forbid the Board's consideration of a parent company finances; indeed, the Board declined to consider the profits of a respondent's parent company only after the complainants in that case had failed to demonstrate why the information was relevant." *Id*. at 5.

Finally, complainants do not address "corporate veil-piercing" issues because they argue that they are not attempting to do so nor are they required under case law. *Id*. at 1-2, 6.

**MWG's Reply**

The respondent argues that complainants are "asking the Board to expand the [Act] to evaluate a party's ability to pay as a matter of course, but also evaluate a non-party's ability to pay…" Reply at 1. MWG argues that ability to pay language is not included in Section 33 (c) or 42 (h) of the Act-but the Board has considered a party's ability to pay when a party claims an inability to pay, [but] that is not the case here." *Id*. at 2. MWG states that when a "party claims inability to pay, the Board limits its financial review to the named party, and not the ability of a party to potentially access other funds." *Id*. (citations omitted).

Further, MGW argues that even if the Board finds the assets of a parent company relevant in its Section 42 (h) analysis, testimony by its financial expert David Callen, NRG's Chief Financial Officer, demonstrates that MWG is an indirect subsidiary of NRG. *Id*. at 4. Mr. Callens testimony, found in his deposition, explains that "MWG cannot access nor demand any capital from NRG for its operations, maintenance or improvements at the Stations…[and] NRG has no obligation to fund or provide assets to MWG." *Id*.

MWG also reiterates its argument that when attempting to pierce the corporate veil, the courts require that the parent company must be a named party. *Id*. at 6. In support, MWG cites to St. Croix Renaissance Group, LLLP, et al., v. St. Croix Alumina, LLC, et al., 2010 U.S. Dist. LEXIS 122611 *3-5 (D.V.I. Nov. 18, 2010), *citing* U.S. Bestfoods, 524 U.S. 51, 61, 118 S.Ct. 1876 (1998).

Finally, MWG states that unlike the scenario in Panhandle, MWG has repeatedly objected to the relevance of the Environmental Groups inquires into NRG's finances. *Id*. MWG states that it has made repeated relevance objections to complainants document requests and before the deposition of Mr. Callen, NRG's Chief Financial Officer. *Id*.

**Discussion and Ruling**

In determining an appropriate remedy for violation of the Act, the Board considers the language of Section 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h)) to determine an appropriate penalty. Under those two statutory provisions, the Board considers economics in conjunction with the social and economic value of the pollution source (Section 33(c)(ii)) and any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance (Section 42(h)(3)). In addition, the Board considers the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act (Section 42(h)(4)). MWG is seeking to strike evidence regarding NRG, its parent company.

Complainants appear to rely heavily on the Board's decision in Panhandle where the Board considered the parent company's financials in its Section 42 (h) economic benefit analysis. It should be noted that in Panhandle, the parent company was the owner of the subsidiary in 1987, before the violations occurred. Also, as MWG pointed out, it appears that there were no objections to the use of the parent corporate financials or that parent liability was ever an issue before the Board. Here, MWG objected several times to the use of NRG's financials. Several of the cases cited by complainants involve issues regarding an inability to pay; however MWG does not make that argument here. And as noted above the inability to pay is not a consideration found in Section 42 (h) of the Act.

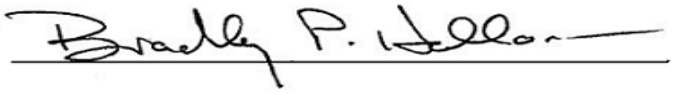
Complainants address MWG's reliance on Charter Hall, where the Board declined to consider a parent company's financials because complaints "have not established that [parent company] is responsible for these violations or adequately demonstrated that this information is relevant to the penalty…" *Id*. slip op. at 14. Likewise, in this case, complainants have not established NRG is responsible for the violations nor have they demonstrated that this information is relevant to the penalty. NRG is not a named party and the Board has found only MWG responsible for the violations of the Act and underlying regulations

For these reasons, I grant MWG's motion *in limine* to exclude the portions of the Shefftz Opinion that concern NRG.

**Motions for Interlocutory Appeal from Hearing Officer Orders**

The parties are advised that if they choose to file an interlocutory appeal, it must be filed within 14 days after the party receives the hearing officer's written order. Filing a motion for interlocutory appeal will not postpone a scheduled hearing, stay the effect of the hearing officer's ruling, or otherwise stay the proceeding. *See* Section 101.518 of the Board's procedural rules. *But see* Section 101.514 of the Board's procedural rules addressing motions to stay proceedings.

IT IS SO ORDERED.



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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on April 13, 2021, to each of the persons on the service list below.

It is hereby certified that a true copy of the foregoing order was e-mailed to the following on April 13, 2021:

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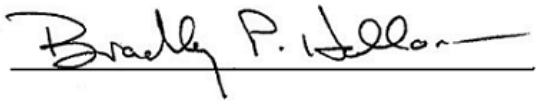

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