

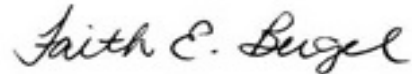
**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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	)	

**NOTICE OF FILING**

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS’ MOTION TO RECONSIDER OR, IN THE ALTERNATIVE, CLARIFY** copies of which are attached hereto and herewith served upon you.

Respectfully submitted,



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Attorney for Sierra Club

Dated: April 19, 2021

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

In the Matter of:	)	
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SIERRA CLUB, ENVIRONMENTAL	)	
LAW AND POLICY CENTER,	)	
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CITIZENS AGAINST RUINING THE	)	
ENVIRONMENT	)	
	)	
Complainants,	)	
	)	
v.	)	PCB No-2013-015
	)	(Enforcement – Water)
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

**COMPLAINANTS’ MOTION TO RECONSIDER OR,  
IN THE ALTERNATIVE, CLARIFY**

Pursuant to 35 Ill. Admin. Code. 101.502(a), Complainants respectfully request that the Hearing Officer reconsider his Order of April 13, 2021 (“Order”) granting Respondent, Midwest Generation, LLC’s (“MWG”) Motion *in Limine* to Exclude Sections of Complainants’ Expert Report dated February 10, 2021. In the alternative, Complainants respectfully request that the Hearing Officer clarify whether his order precludes both parties from submitting evidence on inability to pay for penalties or other remedies. In support of this Motion, Complainants state as follows:

1. Section 101.626 provides that “the hearing officer will admit evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois, except as otherwise provided in this Part.” 35 Ill. Adm. Code 101.626.

2. Section 101.626(a) goes on to provide that “[t]he hearing officer may admit evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of

serious affairs, unless the evidence is privileged.” 35 Ill. Adm. Code 101.626(a). This is a “relaxed standard.” *People v. Atkinson Landfill Co.*, PCB No. 13-28, slip op. at 9 (Jan. 9, 2014). Under Illinois law, “relevant evidence” is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ill. R. Evid. 401; *see also People v. Morgan*, 758 N.E.2d 813, 843 (Ill. Sup. Ct. 2001) (citing *People v. Illgen*, 583 N.E.2d 515 (Ill Sup. Ct. 1991)).

3. Here the fact of consequence is MWG’s ability (or inability) to pay for civil penalties and other remedies. A respondent’s ability to pay is typically considered only when raised by a party facing an expensive penalty or mandated remedy. The Board has historically considered respondents’ ability to pay as part of remedy factor 415 ILCS 5/33(c)(iv), which examines “the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source.” *See, e.g., Illinois v. Victor Cory*, PCB Case No. 98-171, 1999 WL 562169, at \*15 (July 22, 1999) (weighing this factor neutrally “due to the potentially high cost of lagoon closure” compared to the respondent’s finances). It has historically considered ability to pay as part of penalty factor 415 ILCS 5/42(h)(4), which examines “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.” *See, e.g., Illinois v. John Prior D/B/A Prior Oil Company And James Mezo D/B/A Mezo Oil Company*, PCB Case No. 02-177, 2004 WL 1090239, at \*29 (May 6, 2004) (noting that “the size or financial capacity of an entity that violated the Act is relevant to setting a penalty amount that will deter future violations

by the entity and those similarly situated”). Thus, ability to pay will be central to both the remedy and penalty determinations in the event Midwest Generation raises the issue.

4. In his Order of April 13, 2021, Hearing Officer Halloran stated that “MWG does not make that [inability to pay] argument here.” Order at 5. Nevertheless, nothing precludes MWG from making that argument in the future. During the April 14, 2021 status conference, MWG’s counsel indicated that they may raise an inability to pay argument in the future and should not be precluded from raising that argument. PCB 13-15, Status Conference (April 14, 2021). Also during the status conference, the Hearing Officer indicated a potential reluctance to limit a party’s ability to introduce evidence on inability to pay in the future. *Id.* Both MWG’s and the Hearing Officer’s statements suggest that inability to pay is relevant and, therefore, a fact of consequence.

5. Complainants have previously briefed at length and served an expert report (written by Jonathan Shefftz) on how NRG’s finances, corporate control, and management polices impact MWG’s ability to pay a penalty in amounts sufficient “to deter further violations by the respondent.” 415 ILCS 5/42(h)(4). NRG’s financial control and resources “has [a] tendency to make the existence of any fact that is of consequence”—in the present case, MWG’s ability to pay penalties and the deterrent effect of a penalty—“either more or less probable.” *People v. Morgan*, 758 N.E.2d 813, 843 (Ill. Sup. Ct. 2001). As such, NRG’s financial information is “material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs, unless the evidence is privileged.” 35 Ill. Adm. Code 101.626(a).

6. For example, “if the subsidiary does not retain its revenues, as the evidence showed in this case, then its parent's financial resources are highly relevant.” *United States v. Mun. Auth. of Union Twp.*, 150 F.3d 259, 268 (3d Cir. 1998). As demonstrated by the deposition

testimony of David Callen, **NON-DISCLOSABLE INFORMATION**

[REDACTED]

[REDACTED]

[REDACTED]

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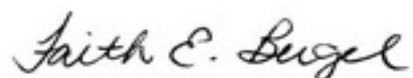
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7. If the Hearing Officer maintains his conclusion that NRG's financial information should be excluded from this proceeding, then both parties should also be precluded from introducing evidence of inability to pay. If the Hearing Officer is considering allowing MWG to argue that it is unable to pay for any given penalty or remedy at the hearing, then Complainants will be severely prejudiced by not being able to develop counter-evidence on MWG's ability to pay for a given penalty or remedy based on MWG's parent companies' finances. If NRG's financial information and MWG's ability to obtain capital from NRG are not relevant, then by corollary, MWG's inability to pay penalties or remedy costs of any given amount should not be relevant either.

WHEREFORE, Complainants respectfully request that the Hearing Officer grant Complainants Motion for Reconsideration. Alternatively, Complainants respectfully request that the Hearing Officer clarify whether his order precludes both parties from submitting any evidence on inability to pay.

Dated: April 19, 2021

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned, Jeffrey Hammons, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' MOTION TO RECONSIDER OR, IN THE ALTERNATIVE, CLARIFY** before 5 p.m. Central Time on April 19, 2021 to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 59 pages.

Respectfully submitted,

Jeffrey Hammons

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# **Exhibit A**

David Callen Deposition Transcript  
(conducted Dec. 2, 2020)

**Exhibit A contains confidential non-disclosable information so it is not attached to the public version of this filing**