**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, Midwest Generation, LLC's REDACTED Response to Complainants' Motion to Reconsider or Clarify without the Non-Disclosable Exhibits, a copy of which is hereby served upon you. The UNREDACTED Response and Non-Disclosable Exhibits have been mailed to the IPCB, Don Brown.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: May 3, 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 Midwest Generation, LLC's REDACTED Response to Complainants' Motion to Reconsider or Clarify without the Non-Disclosable Exhibits, a copy of which is hereby served upon you was filed on May 3, 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 of the UNREDACTED Response to Complainants' Motion to Reconsider or Clarify along with the Non-Disclosable Exhibits and the REDACTED Response to Complainant's Motion to Reconsider or Clarify along with the Non-Disclosable Exhibits were emailed on May 3, 2021 to the parties listed on the foregoing Service List. The UNREDACTED Response and Non-Disclosable Exhibits have been mailed to the IPCB, Don Brown.

/s/ Jennifer T. Nijman

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

| | | |
|---|---|---|
| **In the Matter of:** | ) | |
| | ) | |
| **SIERRA CLUB, ENVIRONMENTALLAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, and CITIZENS AGAINST RUINING THE ENVIRONMENT** | ) | |
| | ) | **PCB 2013-015** |
| **Complainants,** | ) | **(Enforcement – Water)** |
| | ) | |
| **v.** | ) | |
| | ) | |
| **MIDWEST GENERATION, LLC,** | ) | |
| | ) | |
| **Respondent.** | ) | |

**MIDWEST GENERATION, LLC'S RESPONSE**
**TO COMPLAINANTS' MOTION TO RECONSIDER OR CLARIFY**

The Hearing Officer correctly excluded evidence about an indirect parent company that is not a party to this case. Complainants' motion to reconsider should be denied because it does not meet the Illinois Pollution Control Board's ("Board") standards for reconsideration under 101.902. Complainants fail to identify any new evidence or change in the law to conclude that the Hearing Officer's decision was in error. Instead, Complainants incorrectly conflate the issue of inability to pay with the question of *which party* is responsible to pay. The Hearing Officer properly determined that the only relevant information relates to MWG, the party the Board found responsible for the violations of the Illinois Environmental Protection Act ("Act") and underlying regulations. Hearing Officer Order, p. 5. Complainants' motion to reconsider clearly demonstrates that Complainants are attempting to improperly pierce the corporate veil through their expert's opinion, and the Hearing Officer was correct to bar that effort.

For the same reason, the Hearing Officer's order requires no further clarification nor amendment. The Hearing Officer's order does not preclude either party from introducing evidence

on the financial status *of MWG*, the only named party and the only party found in violation by the Board.

### A. Complainants Fail to Meet the Standard for a Motion to Reconsider

The standard for a motion to reconsider is whether there is new evidence, a change in the law, or errors in the application of the law. 35 Ill. Adm. Code 101.902; *People of the State of Illinois v. Demolition Excavating Group, et al.*, PCB 14-2, 2015 Ill. Env. LEXIS 222, *3. Complainants do not identify any new evidence for the Hearing Officer to consider, they do not identify a change in the law relating to whether a non-party's finances should be considered when imposing a penalty, and have not identified any error in application of the law. Complainants merely ask the Hearing Officer to hear them again for no reason other than they did not like the decision. Because Complainants have failed to meet any of the standards for reconsideration, the Hearing Officer should deny Complainants' motion.

### B. The Hearing Officer is Correct That Only Information Regarding MWG is Relevant

Even assuming there is a basis for reconsideration, and there is not, Complainants' motion misreads the Hearing Officer's decision by incorrectly asserting that the decision was based on whether or not MWG would assert inability to pay. The Hearing Officer gave no opinion on whether MWG's ability or inability to pay was relevant. Rather, the Hearing Officer's opinion correctly found that a *non-party's* ability to pay is not relevant and thus must be excluded. Hearing Officer Order, p. 5. In their motion, Complainants improperly conflate two legally distinct issues: (1) a party's (MWG's) ability or inability to pay in consideration of the Section 33(c) and 42(h) factors, and (2) consideration of an indirect, non-party parent company's (NRG Energy, Inc.'s) ability to pay for a named party's violations. By merging the two legally distinct issues,

Complainants' wrongfully claim that the financial status of MWG's indirect parent, NRG Energy, Inc. ("NRG") is somehow relevant to MWG's ability or in ability to pay.

Complainants' motion first focuses on the possibility of MWG claiming an inability to pay in the future. Motion, ¶¶3, 4. Complainants correctly state, and there is no dispute, that the Board may consider "*a respondent's* ability to pay" when raised by "*a party*" facing an expensive penalty or mandated remedy. Motion, ¶3, *emphasis added*. The Board opinions Complainants rely upon also support the conclusion that *a party's* finances may be a consideration in determining whether a corrective action and/or a penalty is reasonable. *People of the State of Illinois v. Victor Cory*, PCB 98-171, (July 22, 1999), *14 (Board considered the potentially high cost of a corrective action to the respondent)(emphasis added); *People of the State of Illinois v. John Prior d/b/a Prior Oil Co. and James Mezo d/b/a Meza Oil Co.*, PCB 02-177, *15 (Board specifically stated that the "financial capacity of *an entity that violated the Act* is relevant.") (emphasis added). The Hearing Officer and MWG agree that the Board may consider *the respondent's*, in this case MWG's, ability to pay in consideration of the Section 33(c) and 42(h) factors if it becomes an issue. Hearing Officer Order, p. 5, MWG's Reply in Support of its Motion *in Limine*, p. 2.[1]

However, Complainants then make a giant and unsupported leap to the conclusion that because MWG has the right to claim an inability to pay in the future, the finances of MWG's indirect and unnamed parent are somehow a relevant consideration. Motion, ¶¶5, 6. Complainants' support for this leap of logic is a self-serving reliance upon their own expert's opinion, an Illinois Supreme Court case reviewing a murder conviction, and an out of context quote from a Federal Third Circuit Clean Water Act case, while ignoring the numerous other Federal cases that held oppositely. *Id.* Complainants' reliance on their own expert's opinion to support the legal

[1] As further described in Section D below, MWG is a separate, profitable entity, and recorded an operating income of $175 million in 2019. Ex. 3, Callen 2020 Dep. p. 63:23-64:1.

conclusion that an indirect parent corporation's finances are relevant or that it is financially responsible for its subsidiary's violations is circular, irrelevant, and should be summarily disregarded as an improper legal opinion. It is no surprise that the financial status of NRG is much larger than that of MWG. But just because NRG is a large company with many other indirect subsidiaries that provide it with revenue, does not mean that its company finances, unrelated to MWG, are relevant to the Board's findings against MWG. [redacted] The Hearing Officer correctly decided that NRG's unrelated indirect subsidiaries and revenue have no relevance here.

If Complainants' argument were accepted, the Board would be creating the precedent of automatically considering the finances of any indirect parent company, parent company, or any other potential source of a company's assets in assessing the 33(c) and 42(h) factors. This is simply beyond the scope of the Act or the Board Rules and, as discussed below, is an end run around standard principles of corporate law.

Complainants' reliance on the Illinois Supreme Court case, *People v. Morgan*, 758 N.E.2d. 813, 843 (2001), is inapplicable and nonsensical, because the case fully supports the conclusion that information about a non-party is not relevant and should be excluded. In *People v. Morgan*,

the Illinois Supreme Court considered whether testimony from the defendant's mother (a non-party) about the abuse she suffered by the murder victims was relevant to the defendant's claim of self-defense. In considering the testimony, the Illinois Supreme Court stated that evidence that is "remote, uncertain, or speculative" is not relevant and may be rejected. *Id.* at 843. Based upon those boundaries of relevancy, the Illinois Supreme Court found that the nexus between the testimony of the defendant's mother (the non-party) and the defendant's claim of self-defense was so remote that it was *not* relevant, and upheld the trial court's decision to exclude the evidence. *Id.* at 844. This criminal case about a mother's testimony has no import here.

Similarly, Complainants' reliance upon a single quote from a Federal Third Circuit Clean Water Act case does not support their claim that a non-party parent's finances are relevant. Instead, the Federal Third Circuit case, *United States v. Union Twp.*, 150 F.3d 259 (3rd Cir. 1998), only supports the conclusion that federal court may consider a parent's financial statement to assure that the penalty would not be set at a level above the *subsidiary*'s ability to pay. *Adams et al. v. Teck Comnico Alaska, Inc.*, 399 F.Supp.2d 1031, 1038 (D. Alaska 2005) *citing United States v. Union Twp.*, 150 F.3d 259, 268 (3rd Cir. 1998). It is the subsidiary that is relevant. Similarly, in this case, NRG's financial statements are relevant only to the extent they include information about the financial status of MWG. MWG has provided Complainants with all such relevant information. Complainants are trying to suggest that the unrelated finances of an indirect parent, NRG, that is also indirect parent to hundreds of other operating companies, are somehow relevant to calculating "economic benefit". In his opinion concerning the economic impact of penalty payment and compliance costs, Complainants' expert Mr. Shefftz bases his conclusion on analysis of NRG financials, rather than MWG financials.[2] In fact, Mr. Shefftz uses the NRG financial information

[2] J.S. Shefftz, Expert Opinion on Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs, January 25, 2021, pp. 30-38 (attached to Motion in Limine as Exhibit 1)

even in light of the fact that NRG acquired MWG in 2014 – which, according to the Board, was after the non-compliance ended at least three of the MWG Stations.[3] This falsely inflates the total amounts in his opinions. The Hearing Officer correctly granted the Motion in Limine to exclude NRG's finances as not relevant.

Complainants also fail to address *Adams et al. v. Teck Comnico Alaska, Inc.*, and the other federal cases specifically rejecting consideration of a non-party parent's financial status as irrelevant. In *Adams*, the defendant moved to exclude plaintiffs' expert report as irrelevant because it relied upon the defendant's parent's balance sheet instead of the defendant's financial statements to determine the economic benefit. *Adams,* 399 F.Supp.2d at 1037. The court rejected the plaintiffs' reliance on *United States v. Union Twp.*, and stated that it could not find any authority that "supports considering a parent corporation's financial statements in determining the economic benefit of a subsidiary's violation of the Clean Water Act where the parent corporation is not a party." *Id.* at 1038. Because the defendant was the only violator, and because the penalty would be imposed on the defendant, the court held that the economic benefit received by non-parties, including the parent, was not relevant and excluded the expert opinion. *Id. See also United States v. Dico, Inc.*, 4 F. Supp. 3d 1047, 1065 n. 43 (S.D. Iowa 2014), aff'd in part, rev'd in part on other grounds, 808 F. 3d 342 (8th Cir. 2015) (Court refused to consider the assets of the non-party parent company finding it to be "somewhat at odds with the basic principle of corporate law that each incorporated business entity enjoys a separate legal existence."); *United States v. Mt. State Carbon, LLC*, 2014 U.S.Dist. LEXIS 97184, *94 (N.D.W.Va. July 17, 2014) (Court found that the non-party parent was "in no way liable or responsible for any civil penalties."); *United States v.*

[3] Interim Opinion and Order of the Board, PCB 13-15, June 20, 2019, p.2. (showing non-compliance dates ending in 2013).

*Magnesium Corp. of Am.* 2006 U.S.Dist. LEXIS 39944, *14-16 (D. Utah 2006) (court denied motion to compel financial information about the defendant's parents, because the parent corporations were not parties to the case and the United States could not "back-door" a veil-piercing that was disallowed in *Bestfoods*.)

The Hearing Officer's opinion was correct and supported by fact and law. Financial information related to a non-party indirect parent company, in this case NRG, that has not been found in violation of the Act or the underlying regulations, is not relevant and was properly excluded.

**C. Complainants' Reliance on the Relationship Between MWG and NRG Clearly Demonstrates that They are Attempting to Back-door a Veil-Piercing Theory**

Complainants' repeated references to the fact that NRG conducts certain administrative functions for its affiliated companies, including MWG, demonstrates that Complainants are simply attempting to a claim that NRG controls MWG and/or is MWG's alter ego – which is a veil-piercing analysis. Complainants' attempt to "back-door" this veil-piercing theory through their expert is improper and was correctly barred. It is an 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). Performing administrative functions for all its subsidiaries does not change the [redacted] The law in Illinois is clear that 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).

We are now far past the point where Complainants can raise the concept of the corporate veil between MWG and its indirect parent company, NRG. The Board has already made a finding of liability against MWG and the Hearing Officer properly precluded Complainants from surreptitiously inserting the idea that finances of an indirect parent company, consisting of many unrelated subsidiaries, are relevant during the remedy phase.

**D. No One is Precluded From Introducing Evidence of MWG's Ability or Inability to Pay**

Complainants now request that the Hearing Officer also prelude MWG from introducing evidence of inability to pay in the future. This is not a "clarification," but a new request for new relief that further demonstrates Complainants' desire to disregard the basic tenets of corporate law. The Hearing Officer's opinion is clear – it does not preclude anyone from introducing evidence about financial status of **MWG**, the sole responsible party. [redacted] Because the Board found MWG responsible for the violations of the Act and underlying regulations, MWG's ability or inability to pay may be relevant in the future, but that analysis would not include the financial status of any other non-party. Thus, the Hearing Officer's opinion needs no clarification, and the Hearing Officer should deny Complainants' new request to preclude the introduction of evidence of MWG's ability or inability to pay.

**E. CONCLUSION**

Complainants' motion is merely a regurgitated attempt to impose a new, overreaching standard for relevancy – incorrectly arguing that the finances of a non-party entity are somehow relevant and should be considered when evaluating 33(c) and 42(h) factors. Here, the Hearing Officer correctly determined that the finances of an indirect parent entity, not named in the case

and not required to pay debts of one of its many indirect subsidiary companies, are not relevant to the potential remedy against MWG.

For the reasons stated herein, in MWG respectfully requests that the Hearing Officer deny Complainants' motion for reconsideration, and deny Complainants' request to preclude the introduction of evidence of MWG's ability or inability to pay.

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 S. LaSalle Street, Suite 3600
Chicago, IL 60603
312-251-5255

# EXHIBIT 1

## NON-DISCLOSABLE DOCUMENTS

# EXHIBIT 2

## NON-DISCLOSABLE DOCUMENTS

# EXHIBIT 3

## NON-DISCLOSABLE DOCUMENTS