

ILLINOIS POLLUTION CONTROL BOARD  
June 4, 2021

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

**HEARING OFFICER ORDER**

**ABBREVIATED PROCEDURAL HISTORY**

On June 20, 2019, the Board found that Midwest Generation, LLC, (MWG), violated the Environmental Protection Act (Act) and Board regulations and held that an additional hearing was required to determine the appropriate relief and any remedy, considering Sections 33 (c) and 42 (h) of the Act (415 ILCS 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). The parties proceeded to discovery for the relief and remedy portion of the hearing.

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 an Expedited Motion for Stay Pending the Board’s Decision with Memorandum in Support (Memo) and Non-Disclosable Exhibits attached (Mot. for Stay). Both motions were directed to the Board, and both motions were 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.

By Order of April 13, 2021, I granted MWG’s motion *in limine* to exclude the portions of the Environmental Groups expert opinion of Jonathon S. Shefftz (Shefftz Opinion) that opine about MWG’s indirect parent, NRG Energy, Inc. Hearing Officer Order, slip at 2,5 (April 13, 2021). Complainants argued that the Shefftz Opinion was needed and would be relevant in the event MWG raises an inability to pay argument in the future. *Id.* at 3-4.

On April 19, 2021, the Environmental Groups filed a Motion to Reconsider or, in the Alternative, Clarify my Order of April 13, 2021. (Mot. to Reconsider). On April 27, 2021, complainants filed a Motion for Interlocutory Appeal from Hearing Officer Order Granting MWG Motion *in limine* to Exclude Sections of Complainants Expert Report. (Appeal). On May

3, 2021, MWG filed its Response to Complainants Motion to Reconsider or Clarify. (Resp.). On May 11, 2021, MWG filed its Response to Complainants Motion for Interlocutory Appeal. (Resp. to Appeal).

### **The Environmental Groups Motions**

#### **Environmental Groups Motion to Reconsider or, in the Alternative, Clarify**

The Environmental Groups recycle the arguments found in their February 24, 2021 filing. (Oppos.). Citing Board procedural rules and the Illinois Rules of Evidence, the complainants argue that the inability to pay evidence is relevant. Mot. to Reconsider at 1-5.<sup>1</sup> On page 1 and 5 of the complainants' motion, they ask "whether [my] order precludes both parties from submitting evidence on inability to pay for penalties and remedies." Mot. to Reconsider at 1 and 5.

#### **Summary of MWG's Response**

MWG argues that 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." Resp. at 2. Therefore, MWG continues, the complainants do not meet the standard to reconsider. *Id.*

#### **The Environmental Groups Motion for Interlocutory Appeal**

The complainants' motion for interlocutory appeal rehashes the arguments that they have set forth in their motion to reconsider or clarify presently before the hearing officer. Appeal at 1-6.

#### **MWG's Response to Complainants Interlocutory Appeal**

MWG's response reiterates its arguments that it raised in its response to complainants' motion for reconsideration or clarify presently before the hearing officer. Resp. to Appeal at 1-14.

#### **Discussion and Ruling**

I am not persuaded to reconsider my ruling of April 13, 2021. The Environmental Groups do not cite a change of law, nor have they presented newly discovered evidence to conclude that my decision was in error. 35 Ill. Adm. Code 101.902. I am hesitant to address complainants

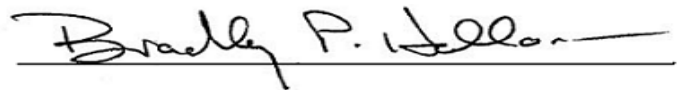
---

<sup>1</sup> The Environmental Groups Mot. to Reconsider is not paginated.

request to clarify because complainants chose to raise that issue before the Board in their motion for interlocutory appeal, filed eight days after their motion to reconsider or clarify. I defer those issues to the Board.<sup>2</sup>

Complainants' Motion to Reconsider is denied.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Bradley P. Halloran". The signature is written in a cursive style and is positioned above a solid horizontal line.

Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center, Suite 11-500  
100 W. Randolph Street  
Chicago, Illinois 60601  
312.814.8917  
Brad.Halloran@illinois.gov

---

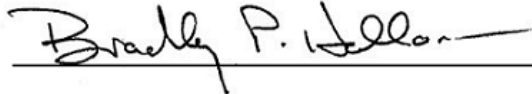
<sup>2</sup> On April 13, 2021, I also deferred MWG's motion to stay discovery regarding economic issues until the Board decides MWG's motion *in limine*. Hearing Officer Order at 2.

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on June 4, 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 June 4, 2021:

Don Brown  
Illinois Pollution Control Board  
James R. Thompson Center  
100 W. Randolph St., Ste. 11-500  
Chicago, Illinois 60601

A handwritten signature in black ink that reads "Bradley P. Halloran" with a horizontal line underneath.

Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street, Suite 11-500  
Chicago, Illinois 60601  
312.814.8917

@ Consents to electronic service

SERVICE LIST

PCB 2013-015@  
Jennifer T. Nijman  
Nijman Franzetti LLP  
10 S. LaSalle Street  
Suite 3600  
Chicago, IL 60603

PCB 2013-015@  
Jeffrey Hammons  
Environmental Law & Policy Center  
35 E. Wacker Drive  
Suite 1600  
Chicago, IL 60601

PCB 2013-015@  
Keith I. Harley  
Chicago Legal Clinic, Inc.  
211 W. Wacker Drive  
Suite 750  
Chicago, IL 60606

PCB 2013-015@  
Abel Russ  
Environmental Integrity Project  
1000 Vermont Avenue NW  
Suite 1100  
Washington, DC 20005

PCB 2013-015@  
Susan M. Franzetti  
Nijman Franzetti LLP  
10 S. LaSalle Street  
Suite 3600  
Chicago, IL 60603

PCB 2013-015@  
Kristen L. Gale  
Nijman Franzetti LLP  
10 S. LaSalle Street  
Suite 3600  
Chicago, IL 60603

PCB 2013-015@  
Greg Wannier  
Sierra Club  
85 Second Street  
Second Floor  
San Francisco, CA 94105

PCB 2013-015@  
Kelly Emerson  
Nijman Franzetti LLP  
10 S. LaSalle Street  
Suite 3600  
Chicago, IL 60603

PCB 2013-015@  
Faith Bugel  
1004 Mohawk  
Wilmette, IL 60091

PCB 2013-015@  
James M. Morpew  
Sorling, Northrup, Hanna, Cullen & Cochran,  
Ltd.  
1 North Old State Capitol Plaza, Suite 200  
P.O. Box 5131  
Springfield, IL 62705

PCB 2013-015@  
Jennifer M. Martin  
Heplerbroom LLC  
4340 Acer Grove Drive  
Springfield, IL 62711

PCB 2013-015@  
Melissa S. Brown  
Heplerbroom LLC  
4340 Acer Grove Drive  
Springfield, IL 62711