

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	Attached Service List
Illinois Pollution Control Board	
James R. Thompson Center	
100 West Randolph Street, Suite 11-500	
Chicago, IL 60601	

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC’s Motion *In Limine* to Preclude Evidence Regarding NRG Energy, Inc., a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: February 4, 2022

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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 Motion *In Limine* to Preclude Evidence Regarding NRG Energy, Inc., a copy of which is hereby served upon you was filed on February 4, 2022 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 Notice of Filing, Certificate of Service for Midwest Generation, LLC's Motion *In Limine* to Preclude Evidence Regarding NRG Energy, Inc. were emailed on February 4, 2022 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 PRECLUDE EVIDENCE REGARDING NRG ENERGY, INC.

Pursuant to 35 Ill. Adm. Code 101.500, 101.502 and 101.504, Respondent, Midwest Generation, LLC (“MWG”), submits this Motion *In Limine* requesting that Complainants be barred from offering any documents, testimony or other evidence regarding the relationship between MWG and its indirect parent company, NRG Energy, Inc. (“NRG”), the financial condition of NRG, and any potential economic impact of a penalty and payment on NRG.

In support of its Motion, MWG states as follows:

1. On February 10, 2021, MWG filed a motion *in limine* to exclude the portions of Jonathan Shefftz’s expert opinions relating to NRG, specifically NRG’s relationship with MWG, its financial condition, and Shefftz’s opinion on the economic impact of a penalty and compliance costs on NRG. On April 13, 2021, the Hearing Officer granted MWG’s Motion *in limine*, holding that “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."

2. Complainants responded with a Motion for Reconsideration or, in the Alternative, Clarification on April 19, 2020, which the Hearing Officer denied.

3. On April 27, 2021, Complainants filed a Motion for interlocutory appeal from the Hearing Officer's Order granting the Motion *in Limine*. On Sept. 9, 2021, the Board denied the appeal, finding that Complainants:

"have presented no argument to persuade the Board that the hearing officer was incorrect . . . NRG is not a party to the case, nor has it been alleged to have violated the Act or Board regulations in this matter. The April 13, 2021, hearing officer order correctly stated that inability to pay is not a consideration found in the Act. . . Further at this time, the Board finds that the Environmental Groups have not yet demonstrated the relevance of NRG's finances. Per the Board's Rule 101.626(a), the information regarding NRG's finances, as found in the Shefftz Opinion, are not relevant and should not be admitted in this case at this time. 35 Ill. Adm. Code 101.626(a)."

Sept. 9, 2021 Order, pp. 7-8

4. The Board held that the NRG information was barred from the Shefftz expert opinions, and stated that the information might be allowed "if Midwest makes an inability to pay argument."

5. Based on the foregoing, the Hearing Officer and Board have already found that the relationship between NRG and MWG, its financial condition, and any potential economic impact of a penalty or compliance costs on NRG are irrelevant to these proceedings at this time. Further, MWG has not made an inability to pay claim or argument. As a result, like he did with the Shefftz opinions, the Hearing Officer should bar the introduction of any documents, testimony or other

evidence regarding the relationship between MWG and its indirect parent company, NRG, NRG's financial condition, and any potential economic impact on NRG of a penalty or compliance costs.¹

WHEREFORE, for the reasons stated above, MWG requests that the Hearing Officer grant this Motion *In Limine* and enter an order barring Complainants from offering any documents, testimony or other evidence regarding the relationship between MWG and its indirect parent company NRG Energy, Inc., NRG Energy, Inc.'s financial condition, an any potential economic impact on NRG Energy, Inc. of a penalty or compliance costs.

Respectfully submitted,

Midwest Generation, LLC

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

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¹ For clarity, the portions of the Shefftz opinion relating to calculation of weighted-average cost of capital ("WACC") do not relate the subject of this motion, because, as Mr. Shefftz explained, even if MWG were entirely unrelated to NRG, "then the NRG-specific WACC would still be a reasonably accurate proxy for the MWG cost of capital." *See*, p. 16 of Ex. 2 of MWG's Motion in Limine to Exclude Jonathan Shefftz's Opinions filed on this date.