

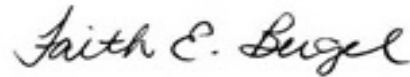
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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,)	
)	
Respondent.)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS’ OBJECTION TO AND APPEAL OF HEARING OFFICER’S RULING ON COMPLAINANTS’ MOTION IN LIMINE TO EXCLUDE PORTIONS OF RESPONDENT’S EXPERT REPORT, OR IN THE ALTERNATIVE TO REINSTATE PORTIONS OF COMPLAINANTS’ EXPERT REPORT**, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,



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Attorney for Sierra Club

Dated: July 27, 2022

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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SIERRA CLUB, ENVIRONMENTAL)	
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COMPLAINANTS’ OBJECTION TO AND APPEAL OF HEARING OFFICER’S RULING ON COMPLAINANTS’ MOTION *IN LIMINE* TO EXCLUDE PORTIONS OF RESPONDENT’S EXPERT REPORT, OR IN THE ALTERNATIVE TO REINSTATE PORTIONS OF COMPLAINANTS’ EXPERT REPORT

Pursuant to 35 Ill. Adm. Code 101.502, Sierra Club, Environmental Law & Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (“Complainants”) submit this objection to one of the Hearing Officer’s rulings on a motion *in limine* in the above-captioned matter and appeal to the Illinois Pollution Control Board (the “PCB” or “Board”). In support of their Objection and Appeal, Complainants state as follows:

1. On February 4, 2022, Complainants filed “Complainants’ Motion *in Limine* to Exclude Portions of Respondent’s Expert Report, or in the Alternative to Reinstate Portions of Complainants’ Expert Report.” (“Complainants’ Motion”). Complainants’ Motion sought to preclude MWG from offering evidence in the form of portions of the report of its expert witness, Gayle Koch, where she opines about the ability of MWG to afford remedies and penalties that the Board may impose. Complainants’ Mot., at 1-2. Alternatively, Complainants requested

reinstatement of portions of their expert Jonathon Shefftz's opinion, in which he opined about MWG's "close financial and operational relationship with its indirect parent corporation, NRG Energy, Inc." Complainants' Mot., at 1.

2. MWG filed a response opposing Complainants' Motion on March 4, 2022. MWG argued that Ms. Koch's opinions about economic reasonableness are a rebuttal to Mr. Shefftz's opinions about the financial condition of MWG. MWG's Resp. at 1-2.

3. On July 13, 2022, Hearing Officer Brad Halloran decided Complainants' Motion along with the Parties' other motions *in limine* ("Hearing Officer Order"). Hearing Officer Halloran denied Complainants' motion *in limine* to exclude portions of Ms. Koch's report. Hearing Officer Order at 14.

4. Hearing Officer Halloran concluded that Ms. Koch's opinions regarding MWG's ability to pay do not pass the threshold that the Board articulated when it held that Complainants "have not yet demonstrated the relevance of NRG's finances . . ." Hearing Officer Order at 14 (citing *Sierra Club, et al., v. MWG*, PCB 13-15 slip op. 2). The Hearing Officer's conclusion expressly relies on his determination that "Ms. Koch's report was merely rebutting Mr. Shefftz's report regarding MWG's ability to pay." *Id.*

5. On September 9, 2021, the Board issued an opinion affirming the Hearing Officer's Order on a prior motion *in limine* brought by MWG, noting that "Midwest has not put forth an inability to pay argument at this time [and i]t is therefore inappropriate to consider NRG's financials when evaluating Midwest's economic benefit under Section 42(h) of the Act." Notably, the Board denied MWG's request to permanently exclude all consideration of NRG financials; instead, it noted that "NRG information . . . will be allowed to be introduced if

Midwest makes an inability to pay argument.” *Sierra Club, et al. v. MWG*, PCB No. 13-15 slip op. at 8 (September 9, 2021).

6. At her deposition on October 22, 2021, Ms. Koch defined economic reasonableness as what someone can reasonably economically pay. Koch Dep. Tr. 67:18-23 (Oct. 22, 2021) (Att. B to Comp’s Mot. *in Limine* (Feb. 4, 2022)). The idea that certain remedies might not be economically reasonable is exactly the “inability to pay argument” that should, according to the Board’s 2021 Order, open the door to information about the finances of MWG’s parent company. .

7. In her report, Ms. Koch makes an explicit argument that the size of a possible remedy penalty should be reduced to make it more commensurate with MWG’s financial limitations. Gayle Schlea Koch, Expert Report in the Matter of Environmental Law and Policy Center et al. C. Midwest Generation, LLC, PCB No. 13-15, at 28-29 (“Koch Expert Report”). In so making this argument, Ms. Koch is effectively asking the Board to consider MWG’s ability to afford (or pay for) the joint remedy and penalty costs.

8. More broadly, Ms. Koch’s report and deposition testimony make clear that MWG intends to argue that MWG’s small size and poor economic outlook will make the company unable to reasonably afford the remedy and penalties Complainants believe are appropriate for MWG’s confirmed violations of the Illinois Environmental Protection Act (“Act”). It is these exact arguments that the Board indicated would trigger the portion of its ruling stating “NRG information . . . will be allowed to be introduced if Midwest makes an inability to pay argument.” *Sierra Club, et al. v. MWG*, PCB No. 13-15 slip op. at 8 (September 9, 2021).

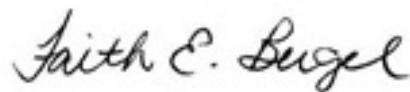
9. The Hearing Officer’s Order leaves Complainants in an untenable position: if they argue that their recommended penalty and remedy are economically reasonable, MWG may rebut that

argument by introducing evidence that purports to demonstrate limitations to MWG's finances; but Complainants are precluded from introducing evidence demonstrating that any such purported limitations are merely illusory due to MWG's access to NRG's resources. Under the Hearing Officer's Order, Complainants may only attempt to prevent MWG from making an unrebuttable inability to pay argument by foregoing introduction of evidence on the economic reasonableness of their proposed penalty and remedy.

WHEREFORE, for the reasons stated above, Complainants request that the Board reverse the Hearing Officer's ruling denying Complainants' motion *in limine*, hold that the facts have changed and the relevance of NRG's finances has been demonstrated, and reinstate the portions of Jonathon Shefftz's expert report where he opined about MWG's close financial and operational relationship with its indirect parent corporation, NRG Energy, Inc. Alternatively, Complainants request that the Board reverse the Hearing Officer's ruling and (1) strike all references to MWG financials from the Koch Report, and (2) enter an order barring Gayle Koch or any other expert or witness from opining or testifying about MWG's ability or inability to afford any remedies or penalties arising from this matter..

Dated: July 27, 2022

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MEMORANDUM IN SUPPORT OF COMPLAINANTS’ OBJECTION TO AND APPEAL OF HEARING OFFICER’S RULING ON COMPLAINANTS’ MOTION *IN LIMINE* TO EXCLUDE PORTIONS OF RESPONDENT’S EXPERT REPORT, OR IN THE ALTERNATIVE TO REINSTATE PORTIONS OF COMPLAINANTS’ EXPERT REPORT

At the heart of this appeal is an loophole to a Board Order that prohibits Complainants from relying on the financial relationship between Midwest Generation, LLC (“MWG”) and NRG, Energy, Inc., but allows Midwest Generation to rely on inability to pay arguments on rebuttal without triggering the Board ruling that allows NRG financial information into the proceeding. The Hearing Officer’s misplaced reliance on the status of Ms. Koch’s testimony as rebuttal creates an enormous loophole not intended by the Board in its September 9, 2021 Order. Economic reasonableness and deterrence are two of the factors that must be considered in the remedy proceeding. 415 ILCS 5/33(c), 42(h). Under the Hearing Officer’s Order, inability to pay testimony will virtually always qualify as a rebuttal to testimony on economic reasonableness and economic deterrence. MWG will therefore remain free to rebut any economic reasonableness argument with evidence of MWG’s inability to pay, and may do so without opening the door to

Complainants' introduction of evidence regarding MWG's access to NRG's resources. As discussed in more detail below, if any economic reasonableness argument by Complainants allows MWG to offer rebuttal on inability to pay, then Complainants should be permitted to introduce evidence, including expert testimony, on NRG, Energy Inc. financial information.

I. Legal Standard

The standard for admissibility of evidence at a PCB hearing is that, in accordance with Section 10-40 of the IAPA, "[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). 8. This is a "relaxed standard." *People v. Atkinson Landfill Co.*, PCB No. 13-28, slip op. at 9 (Jan. 9, 2014).

II. Relevant Procedural History

On February 4, 2022, Complainants filed "Complainants' Motion *in Limine* to Exclude Portions of Respondent's Expert Report, or in the Alternative to Reinstate Portions of Complainants' Expert Report." ("Complainants' Motion"). Complainants sought to preclude portions of MWG expert Gayle Koch's report in which she opines about the ability of MWG to afford remedies and penalties that the Board may impose. Complainants' Mot. at 1. Alternatively, the Complainants requested that portions of their expert Jonathon Shefftz's opinion be reinstated where he opined about MWG's "close financial and operational relationship with its indirect parent corporation, NRG Energy, Inc." *Id.* MWG filed a response opposing Complainants' Motion. MWG argued that it offered Ms. Koch's opinions about economic reasonableness only as a rebuttal to Mr. Shefftz's opinions about the financial condition of MWG. MWG's Resp. at 2. On July 13, 2022, Hearing Officer Brad Halloran decided that Motion along with the Parties' other motions *in limine* ("Hearing Officer Order").

Hearing Officer Halloran denied Complainants' motion *in limine* to exclude portions of Ms. Koch's report. Hearing Officer Halloran concluded that Ms. Koch's opinions regarding MWG's ability to pay do not pass the threshold that the Board articulated when it held that Complainants "have not yet demonstrated the relevance of NRG's finances . . ." Hearing Officer Order at 14 (citing *Sierra Club, et al., v. MWG*, PCB 13-15 slip op. 2). In reaching this conclusion, the Hearing Officer specifically relied on his determination that "Ms. Koch's report was merely rebutting Mr. Shefftz's report regarding MWG's ability to pay." *Id.*

The procedural history of a prior motion *in limine* is relevant to the current Motion and Appeal. On February 10, 2021, MWG filed a motion *in limine* to exclude sections of Complainants' Expert Jonathan Shefftz's report explaining the close operational and financial relationship between MWG and its parent company, NRG Energy, Inc, and to impose a blanket prohibition on the introduction of any evidence regarding NRG. Midwest Generation, LLC's Mot. *in Limine* to Exclude Sections of Complainants' Expert Rep. 2-3 (Feb. 10, 2021) ("MWG's Motion"). On April 13, 2021, the Hearing Officer granted MWG's motion *in limine* to exclude the portions of the Shefftz Opinion that concern NRG. Hearing Officer Order, *Sierra Club, et al. v. Midwest Generation, LLC*, PCB No. 13-15 at 5 (April 13, 2021) ("Hearing Officer's April 2021 Order").

On April 27, 2021, Complainants filed an interlocutory appeal requesting that the Board overturn the Hearing Officer's ruling on the MWG Motion. Complainants' Mot. for Interlocutory Appeal from Hearing Officer Order Granting Mot. *in Limine* (Apr. 27, 2021). On May 11, 2021, Respondent-MWG filed a response to Complainants' appeal. Midwest Generation LLC's Response to Complainants' Mot. for Interlocutory Appeal from Hearing Officer Order, at 3, n. 3 (May 11, 2021). On September 9, 2021, the Board affirmed the Hearing Officer's April 2021

Order, noting in its opinion that “Midwest has not put forth an inability to pay argument at this time [and i]t is therefore inappropriate to consider NRG’s financials when evaluating Midwest’s economic benefit under Section 42(h) of the Act.” *Sierra Club, et al. v. MWG*, PCB No. 13-15 slip op. at 8 (September 9, 2021). Notably, the Board denied MWG’s request to eliminate permanently all consideration of NRG financials; instead, it noted that “NRG information . . . will be allowed to be introduced if Midwest makes an inability to pay argument.” *Id.*

The Board should consider Complainants’ appeal of the Hearing Officer’s Order on Complainants’ Motion as interrelated to other pending appeals discussing the scope of evidence that may be before the Board as it conducts its economic reasonableness and deterrence determinations under Sections 33(c) and 42(h). 415 ILCS 5/33(c), 42(h). In particular, the Board should consider “Complainants’ Objection to and Appeal of Hearing Officer’s Ruling Granting MWG’s Motion *in Limine* to Preclude Evidence Regarding Nrg Energy, Inc.” filed concurrently with this appeal. Taking the issues raised in these two appeals together, the Board should either exclude references to MWG’s financial situation from the Expert Report of Gayle S. Koch, or—in the alternative—reinstate Complainants’ Expert Jonathan Shefftz’s testimony relating to the financial and operational relationship between MWG and its parent company NRG Energy, Inc. and allow Complainants to introduce additional evidence regarding NRG as necessary to rebut MWG’s inability to pay argument. Resolution of Complainants’ Motion *in Limine* to Exclude Portions of Respondent’s Expert Report, or in the Alternative to Reinstate Portions of Complainants’ Expert Report could well impact the Hearing Officer’s decision to exclude this information that serves as the principal basis for MWG’s Motion. *See* MWG’s Mot. at 2-3 (basing its request on the Hearing Officer’s and Board’s previous rulings relating to Mr. Shefftz’s expert testimony).

Ultimately, the Board will have to decide two interrelated questions in the context of the economic reasonableness determination: whether Complainants may offer evidence—including expert testimony—on the topic of MWG’s and NRG’s financial and operational relationship; and whether MWG may offer evidence—including expert testimony—on the topic of MWG’s financial situation and purported constraints on its ability to afford certain penalties and remedies. For the reasons more fully articulated below, Complainants believe those two determinations must be resolved in parallel, *i.e.* the same decision should be reached on both counts.

III. Argument

MWG’s expert witness, Gayle Koch, authored a report in which she opines about the inability of MWG to afford remedies and penalties that the Board may impose. Ms. Koch’s expert report includes multiple allusions to constraints on MWG’s financial situation, which appear in several different sections of her report. Gayle Schlea Koch, Expert Report in the Matter of Environmental Law and Policy Center et al. C. Midwest Generation, LLC, PCB No. 13-25 (April 22, 2021) (“Koch Expert Report”) (allusions to MWG’s financial situation and references to economic reasonableness appear on pages 1-2, 6, 19, 24-25, and 27-29) (Att. A to Complainant’s Mot. *in Limine* (Feb. 4, 2022)). In particular, starting on page 28 of her report, Ms. Koch observes that MWG (a) filed for bankruptcy in 2012, “citing ‘a combination of pending debt maturities, low realized energy and capacity prices, high fuel costs and low generation, and capital requirements associated with retrofitting the Midwest Generation plants to comply with governmental regulations’”; (b) was in bankruptcy through 2014, as a result of which, she opines, “assessing large penalties related to noncompliance during this period is not economically reasonable”; (c) reported asset retirement obligations at a value of \$78 million; and

(d) operates in the coal-fired power generation industry, for which “current and forward-looking expectations . . . [are] not optimistic.” Koch Expert Report., PCB No 13-15, at 28-29. Each of these opinions was presented in the context of Ms. Koch’s expert conclusions that certain compliance and penalty costs “are not economically justified and are not economically reasonable.” *Id.* at 29.

When asked about these expert opinions at her deposition on October 22, 2021, Ms. Koch offered the following explanation: “Economic reasonableness is a requirement for consideration by the [Illinois Environmental Protection] Act. And when you look at economic reasonableness, you think economical would be something that is fair and on the conservative side. Reasonable is what—can somebody reasonably economically pay. And so yes, [company net income] needs to be considered.” Koch Dep. Tr. 67:18-23 (Oct. 22, 2021) (Att. B to Comp’s Mot. *in Limine* (Feb. 4, 2022)).

The “economic reasonableness” portion of Ms. Koch’s report discusses MWG’s troubled financial history and overall negative projections for the future of the coal industry, and presents this discussion in the context of Mr. Shefftz’s proposed remedy and penalty costs. Koch Expert Report., PCB No 13-15, at 27-29. As her deposition testimony makes clear, this is an explicit argument that the size of a possible remedy penalty should be reduced to make it more commensurate with MWG’s financial limitations. In making this argument, Ms. Koch and MWG are asking the Board to consider MWG’s ability to afford (or pay for) the joint remedy and penalty costs.

More broadly, Ms. Koch’s report and deposition testimony make clear that MWG intends to argue that MWG’s small size and poor economic outlook will make the company unable to reasonably afford the remedy and penalties Complainants believe are appropriate for their

confirmed violations of the Illinois Environmental Protection Act (“Act”). This is exactly the argument that the Board indicated would trigger the portion of its ruling allowing information relating to MWG’s close financial and operational relationship with NRG to be considered when the Board said that “NRG information . . . will be allowed to be introduced if Midwest makes an inability to pay argument.” *Sierra Club, et al. v. MWG*, PCB No. 13-15 slip op. at 8 (September 9, 2021).

Complainants’ ability to obtain a fair remedy and penalties will be prejudiced if they cannot fully respond to MWG’s argument that the size and scope of any remedy and penalties in this case should be limited to an amount that would be reasonable considering MWG’s economic profitability and size. “Where [] evidence could be prejudicial, an order granting a motion *in limine* may be safer than an order denying it.” *Cunningham v. Millers Gen. Ins. Co.*, 227 Ill. App. 3d 201, 205, 591 N.E.2d 80, 83 (4th Dist. 1992). In this case, Complainants offered Mr. Shefftz’s testimony explaining MWG’s close financial and operational relationship with NRG precisely to avoid having any Board determination on remedy be thusly limited, but Complainants’ offer was precluded. Respondent’s evidence relating to MWG’s financial situation will be prejudicial if Complainants are not allowed to offer a full rebuttal.

So long as Complainants are precluded from offering information demonstrating that MWG has clear and easy access to the financial resources of its indirect parent NRG, the remedy proceeding will be unduly biased by MWG’s unconstrained freedom to offer evidence and argumentation that MWG’s financial capabilities should limit the remedy and penalties in this case. Indeed, it is exactly this concern that prompted the Board to deny MWG’s request for a blanket exclusion in the MWG Motion “to bar any witness from opining or testifying about an entity other than Midwest.” *Sierra Club, et al. v. MWG*, PCB No. 13-15 slip op. at 8 (September

9, 2021). Thus, the portions of Mr. Shefftz's testimony relating to the relationship between MWG and NRG should be reinstated consistent with the Board's previous ruling on this issue; or alternatively, the portions of Ms. Koch's report containing such argumentation should be stricken from the record, and all related testimony should be disallowed at the hearing.

As discussed above, Hearing Officer Halloran denied Complainants' motion *in limine* to exclude portions of Ms. Koch's report on the basis that Ms. Koch's opinions regarding MWG's ability to pay do not pass the threshold that the Board articulated when it held that Complainants "have not yet demonstrated the relevance of NRG's finances. . ." Hearing Officer Order at 14 (citing *Sierra Club, et al., v. MWG*, PCB 13-15 slip op. 2). Hearing Officer Halloran based this conclusion on his determination that "Ms. Koch's report was merely rebutting Mr. Shefftz's report regarding MWG's ability to pay." *Id.* The Hearing Officer points to MWG's argument that "Because Mr. Shefftz concludes that compliance costs and penalty are 'economically reasonable' and 'affordable' to MWG, Ms. Koch's opinions in response regarding MWG's financial condition must be allowed." *Id.* (quoting MWG's Response at 4).

The heart of this appeal centers on the following conflict: economic reasonableness and the deterrent of penalties are two of the factors that the Board must consider in the remedy proceeding, and any inability to pay testimony will virtually always qualify as a rebuttal to testimony on economic reasonableness and deterrence. *See* 415 ILCS 5/33(c), 42(h). Complainants' in fact intend to offer evidence that a remedy is "economically reasonable," 415 ILCS 5/33(c), and that a monetary penalty will have a deterrent effect, 415 ILCS 5/42(h). Complainants plan to, appropriately, use an expert witness to offer testimony on these economic considerations. MWG in turn may choose to counter Complainants' showing and rebut any expert testimony of Complainants. The Board has held that Complainants may not rely on any

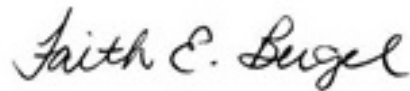
evidence regarding the financial relationship between MWG and NRG unless MWG makes an inability to pay argument. Board Order, at 8 (Sept. 9, 2021). But the Hearing Officer has now held that expert testimony by MWG that is simply rebutting Complainants' expert testimony on economic reasonableness or deterrence doesn't open that door. In doing so, the Hearing Officer's Order makes an arbitrary distinction between direct testimony and rebuttal. Regardless of whether MWG and its experts discuss ability to pay in direct testimony or in rebuttal, they will be arguing that MWG cannot afford remedies and penalties above a certain threshold—the very “inability to pay” argument that should open the door to financial information about MWG's parent company.

IV. Conclusion

For the reasons stated above, Petitioners respectfully request that the Board reconsider its previous ruling and reverse the Hearing Officer's decision denying “Complainants' Motion *in Limine* to Exclude Portions of Respondent's Expert Report, or in the Alternative to Reinstate Portions of Complainants' Expert Report.”

Dated: July 27, 2022

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned, Faith E. Bugel, 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' OBJECTION TO AND APPEAL OF HEARING OFFICER'S RULING ON COMPLAINANTS' MOTION IN LIMINE TO EXCLUDE PORTIONS OF RESPONDENT'S EXPERT REPORT, OR IN THE ALTERNATIVE TO REINSTATE PORTIONS OF COMPLAINANTS' EXPERT REPORT** and **MEMORANDUM IN SUPPORT** before 5 p.m. Central Time on July 27, 2022, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 17 pages.

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