

ILLINOIS POLLUTION CONTROL BOARD  
April 26, 2018

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

ORDER OF THE BOARD (by K. Papadimitriu):

The Board conducted ten days of hearing in this citizen’s water enforcement action brought by Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (Environmental Groups). The Environmental Groups’ action alleges pollution from coal ash ponds at coal-fired power plants owned by Midwest Generation (Midwest Gen or MWG). In today’s order, the Board rules upon the parties’ challenges to the hearing officer’s decisions to admit or exclude exhibits introduced at hearing.<sup>1</sup>

The Environmental Groups appeal the hearing officer’s decision to admit Exhibit 649 into the evidentiary record. At hearing, Midwest Gen introduced Exhibit 649: an apparent email between Illinois Environmental Protection Agency (Agency) employees. The hearing officer overruled an objection from the Environmental Groups and admitted the email into evidence. The Board affirms the hearing officer’s ruling because the email, part of an Agency record in a permit appeal, is reliable.

Midwest Gen appeals the hearing officer’s decision to exclude Exhibit 662 from the evidentiary record. At hearing, Midwest Gen introduced Exhibit 662: an apparent internal strategy document prepared by one of the Environmental Groups. Granting the Environmental Groups’ written objection, the hearing officer excluded it from the record. The Board affirms the hearing officer’s ruling because the document is irrelevant to this case.

In this order, the Board first provides procedural and legal background. The Board then addresses the appeals of the hearing officer’s evidentiary rulings.

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<sup>1</sup> Midwest Gen moved for the Board to sanction the Environmental Groups for failing to comply with the Board’s procedural rules. Midwest Gen argues, among other things, that the Environmental Groups’ motion to exclude parts of Midwest Gen’s expert report and associated testimony is sanctionable. The Board defers ruling on Midwest Gen’s motion for sanctions until the Environmental Groups’ pending motion to exclude is resolved.

## **BACKGROUND**

### **Procedural History**

The Environmental Groups filed a complaint against Midwest Gen on October 3, 2012 and amended it on January 14, 2015. The amended complaint alleges violations of water pollution provisions of the Environmental Protection Act (415 ILCS 5 (2016)) and Board regulations. The alleged violations relate to discharges from coal ash ponds at four power plants owned by Midwest Gen: Powerton Station in Pekin, Tazewell County, Joliet 29 Station in Will & Kendall Counties, Waukegan Station in Lake County, and Will County Station in Will County. The Board held two sets of hearings to develop a factual record on the issue of liability: one from October 23 through October 27, 2017 and another from January 29 through February 2, 2018.

On March 21, 2018, the Environmental Groups appealed the hearing officer's decision to admit an apparent email among Agency employees (Exh. 649) into evidence (Grps. Obj.). On the same day, Midwest Gen appealed the hearing officer's decision to exclude an apparent Environmental Group strategy document (Exh. 662) from evidence (MWG Obj.). Each side responded to the other's objections (MWG Resp., Grps. Resp.).

### **Evidentiary Standard in Board Adjudicatory Hearings**

Board rules establish the evidentiary standard that applies in Board adjudicatory hearings. Generally, the "hearing officer will admit evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois . . ." 35 Ill. Adm. Code 101.626. However, evidence not admissible in Illinois civil courts may be admitted in administrative hearings when "commonly relied upon by reasonably prudent men in the conduct of their affairs . . ." 5 ILCS 100/10-40(a) (2016).

The Board's rules of evidence reiterate this principle. They state that, at an adjudicatory hearing, the hearing officer "may admit evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs . . ." 35 Ill. Adm. Code 101.626(a). Therefore, evidence is generally admissible in Board adjudicatory hearings if (1) it is admissible under Illinois civil courts' rules of evidence; or (2) it is material, relevant, and reliable.

## **DISCUSSION**

### **Motions for Interlocutory Appeal Granted**

The Board's procedural rules allow for interlocutory appeal from a hearing officer ruling. *See* 35 Ill. Adm. Code 101.518. The parties' motions were timely filed. The Board grants the motions for interlocutory appeal.

### **Ruling to Admit Agency Email Affirmed**

At hearing on January 30, 2018, Midwest Gen presented the testimony of Maria Race, a Midwest Gen employee. During Ms. Race's testimony, Midwest Gen offered into evidence what appeared to be an email between Agency employees, Lynn Dunaway and Jamie Rabins dated

January 6, 2016. Tr. at 175:1–2. The email was labeled as Exhibit 649. The email discussed an Agency agreement with Midwest Gen concerning the Waukegan plant. *Id.* at 174:2–5. The Environmental Groups objected, arguing that the email constituted hearsay. *Id.* at 175:5–10. The hearing officer overruled the Environmental Groups’ objection and admitted the email into evidence. *Id.* at 176:24–177:1.

At hearing, Ms. Race stated that the email was part of the public record in a separate Board case, Sierra Club v. Illinois EPA (PCB 15-189). Tr. at 176:13–18. In that case, Sierra Club (among other environmental groups differing from complainants here) challenged the Agency’s decision to grant a water permit to Midwest Gen for the Waukegan plant. In permit appeals, the Agency must file the administrative record that formed the basis for its determination. Exhibit 649 is in the administrative record the the Agency filed for PCB 15-189. *See* Sierra Club v. Illinois EPA, PCB 15-189 (Jun. 26, 2015) (index to administrative record).

The Environmental Groups argue that Midwest Gen cannot provide proper foundation for the email, and therefore it is unreliable. Ms. Race could not personally testify regarding the document’s reliability, and she was not a party to the email. Tr. at 175:9–10. However, this does not show that the email is unreliable. Despite Ms. Race’s lack of personal knowledge, this email is reliable as part of an official administrative record filed by the Agency in a separate proceeding.

Because Exhibit 649 is reliable and therefore admissible under the Board’s procedural rules, the Board affirms the hearing officer’s decision to admit it into the evidentiary record.

### **Ruling to Exclude Environmental Groups’ Strategy Document Affirmed**

Later during Ms. Race’s testimony, Midwest Gen offered into evidence a document that apparently describes Sierra Club’s internal strategy regarding Illinois coal power plants. Tr. at 238:3–4. The document was labeled Exhibit 662. The Environmental Groups objected to admitting this document into evidence. The hearing officer did not rule at hearing, but later issued an order that found the document irrelevant. Sierra Club vs. Midwest Generation, LLC, PCB 13-15 (Mar. 1, 2018) (Hearing Officer Order excluding Exh. 662).

The order stated that Exhibit 662 is not relevant to “the existence or absence of water pollution and open dumping at the power plants.” Order at 2–3. Furthermore, the hearing officer stated that Sierra Club’s motives are not relevant when, as the Board has found in this case, there is a basis in law for its actions. *Id.*

Midwest Gen’s appeal to the Board does not show that Exhibit 662 relates to the existence or absence of water pollution or open dumping at the plants. Midwest Gen first argues that the document is admissible because it is reliable, which has no bearing on whether the document is relevant. MWG Obj. at 5–6. Midwest Gen then argues that Exhibit 662 demonstrates Sierra Club’s motives, which is not relevant to this case. MWG Obj. at 6–9. These arguments do not describe how Exhibit 662 is relevant.

Because Exhibit 662 is irrelevant and therefore inadmissible under the Board’s procedural rules, the Board affirms the hearing officer’s decision to exclude it from the evidentiary record.

**CONCLUSION**

The Board affirms the hearing officer's rulings to admit Exhibit 649 and to exclude Exhibit 662.

IT IS SO ORDERED.

Board Members B.K. Carter and U-Jung Choe abstained.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 26, 2018, by a vote of 3-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive, flowing style.

Don A. Brown, Clerk  
Illinois Pollution Control Board