

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**NOTICE OF FILING**

TO: Don Brown, Assistant 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 the attached **COMPLAINANTS’ OBJECTION TO AND APPEAL OF HEARING OFFICER’S RULING ON RESPONDENT’S EXHIBIT 649**, copies of which are served on you along with this notice.

Respectfully submitted,

/s/ Faith Bugel

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Dated: March 21, 2018

*Attorney for Sierra Club*

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**COMPLAINANTS' OBJECTION TO AND APPEAL OF HEARING OFFICER'S RULING ON RESPONDENT'S EXHIBIT 649**

Pursuant to 35 Ill. Adm. Code § 101.502, Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (“Complainants”), submit this Objection and Appeal from the Hearing Officer’s Ruling to Admit Exhibit 649. In support of their Objection and Appeal, Complainants state as follows:

1. A hearing in the above-captioned matter was held beginning on January 29 and continuing through February 2, 2018.
2. The transcript for the second day of the hearing, January 30, 2018, was posted to the IPCB electronic docket for this case on March 7, 2018.
3. Pursuant to Section 101.502(b), “an objection to a hearing officer ruling made at hearing will be deemed waived if not filed within 14 days after the Board receives the hearing

transcript.” 35 Ill. Adm. Code § 101.502(b). This objection and appeal is thus timely filed.

4. At the hearing, during the Testimony of Maria Race, Respondent moved for Respondent’s Exhibit 649 to be admitted into evidence. (Hr’g Tr. 175:1-2; 176:19-20.)
5. Respondent’s Exhibit 649 is an email from Lynn Dunaway of Illinois Environmental Protection Agency (“IEPA”) to Jamie Rabins also of IEPA with cc to Bill Buscher of IEPA and dated January 6, 2015. The email discusses the Compliance Commitment Agreement (“CCA”) terms for Waukegan Station and includes statements by Mr. Dunaway as to the purported reasoning behind the terms that were included or left out of the CCA.
6. Complainants objected on hearsay grounds (Jan. 30 Hr’g Tr. 175:5-10, 176:22-23.), and made a motion to strike the testimony on the content of the exhibit. (Jan. 30 Hr’g Tr. 175:7-9). The Hearing Officer overruled the objection and admitted the exhibit. (Jan. 30 Hr’g Tr. 176:24-177:1.)
7. Complainants object to the Hearing Officer’s ruling on Exhibit 649, request that the Board exclude Exhibit 649, move to strike the testimony related to Exhibit 649 (Jan. 30 Hr’g Tr. 173:13-174:24, 175:20-176:18), and appeal this ruling to the Board.

**Legal Standard**

8. The standard for admissibility of evidence at a PCB hearing is that, “In accordance with Section 10-40 of the IAPA, the hearing officer will admit evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois, except as otherwise provided in this Part.” 35 Ill. Adm. Code § 101.626.

9. Section 101.626(a) goes on to provide that “[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).
10. Section 101.626(e) provides for the admission of business records even if they otherwise qualify as hearsay.

Admission of Business Records. A writing or record, whether in the form of any entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, may be admissible as evidence of the act, transaction, occurrence, or event. To be admissible, the writing or record must have been made in the regular course of business, provided it was the regular course of business to make the memorandum or record at the time of the act, transaction, occurrence, or event, or within a reasonable time afterwards. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be admitted to affect the weight of the evidence, but will not affect admissibility. The term "business," as used in this subsection (e), includes businesses, professions, occupations, and callings of every kind.

11. The PCB has held that evidence is properly disregarded as hearsay if “prudent persons in the conduct of serious affairs” would not rely upon it. *People of the State of Illinois v. Atkinson Landfill Co.*, PCB No. 13-28, at 27 (January 9, 2014).
12. Further, even under the PCB’s relaxed standard under Section 101.626(a), the Illinois Rules of Evidence still provide guidance to the PCB. This includes the hearsay rules and exceptions contained in the Rules of Evidence. “Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Supreme Court, or by statute as provided in Rule 101.” Ill. R. Evid. 803.
13. One of the exceptions that applies to the hearsay rule—whether the declarant is available or not—is as follows:

Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding,

however, police accident reports and in criminal cases medical records and matters observed by police officers and other law enforcement personnel, unless the sources of information or other circumstances indicate lack of trustworthiness.

Ill. R. Evid. 803.

14. Illinois Courts have made clear that the purpose of the hearsay rule is to “test the real value of testimony by exposing the source of the assertion to cross-examination by the party against whom it is offered.” *People v. Carpenter*, 28 Ill.2d 116, 121, 190 N.E.2d 738, 741 (1963).
15. “[H]earsay evidence includes written evidence of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted, and thus resting for its value upon the credibility of the person who made the assertion out of court.” *Trepanier v. Speedway Wrecking Co.*, PCB 97-50, 1998 WL 744347, at \*5 (October 15, 1998) (citing *People v. Carpenter*, 28 Ill. 2d 116, 121, 190 N.E.2d 738, 741 (1963)).

#### Argument

16. Respondent failed to establish that Exhibit 649 is sufficiently reliable to be admissible over a hearsay objection, as called for in Rule 101.626(a).
17. Ms. Race cannot confirm that the evidence was reliable. First, her name does not appear on the document and she offered no testimony as to first-hand knowledge of the issues discussed in the exhibit. (Oct. 23, 2017 Hr’g Tr. 173: 16-20).
18. In addition, without having Ms. Race’s name on the document and without any testimony from Ms. Race as to the reliability of the document, Respondent failed to establish, in the context of a hearsay objection, the document would still be able to clear hearsay’s higher

bar for admissibility as a public record or report or a business record. Ill. S.Ct. R. Evid. 803; 35 Ill. Admin. Code § 101.626(e).

19. First, Respondent failed to establish that the document falls within the public records exception to the rule prohibiting the admission of hearsay. “The admissibility of public records depends on custody and authenticity.” *Castellari v. Prior*, PCB 86-79, 1987 WL 56063 (May 28, 1987) (citing *Bell v. Bankers Life & Casualty Co.*, 327 Ill. App. 321, 64 N.E.2d 204, 208 (1st Dist. 1945)). Respondent did not offer any testimony as to the custody or authenticity of the email. Respondent did not offer any testimony from Mr. Dunaway, Mr. Rabins, or the custodian of records at IEPA. Respondent did not offer any testimony that the statements in the document set forth “the activities of the office or the agency.” Ill. R. Evid. 803. Finally, Respondent did not establish through Ms. Race whether the email accurately set forth the activities of the office or agency. Ms. Race’s testimony was confined to repeating the contents of the email in Exhibit 649 (Jan. 30 Hr’g Trans. 173:13-174:24) and how and when Ms. Race obtained the email (Jan. 30 Hr’g Trans. 176:12-18).

20. In order for a business record to be admissible over a hearsay objection before the Board, it must fall within Section 101.626(e) of the Board's rules. Section 101.626(e) provides for the admission of business records even if they otherwise qualify as hearsay:

A writing or record, whether in the form of any entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, may be admissible as evidence of the act, transaction, occurrence, or event. To be admissible, the writing or record must have been made in the regular course of business, provided it was the regular course of business to make the memorandum or record at the time of the act, transaction, occurrence, or event, or within a reasonable time afterwards.

35 Ill. Admin. Code § 101.626(e).

21. The party offering the exhibit must establish a proper foundation for the exhibit. *See Illinois, V. State Oil Co.*, PCB 97-103, 2003 WL 1785038, at \*6 (March 20, 2003). (“The Board's business record exception to the hearsay rule requires the party tendering the record to satisfy the foundation requirement of demonstrating that the record was made in the regular course of business.”) Respondent offered no testimony that Exhibit 649 was made in IEPA’s regular course of business. “A sufficient foundation for admitting records may be established through testimony of the custodian of records or another person familiar with the business and its mode of operation.” *Id.* (citing *In Estate of Savage*, 259 Ill. App. 3d 328, 333, 631 N.E.2d 797, 801 (4th Dist. 1994)). Respondent did not offer any testimony from anyone who established that they were familiar with the mode of operation of IEPA. Respondent did not establish that Ms. Race was familiar with the mode of operation of IEPA.
22. Several PCB cases are on point. First is *Illinois v. PanHandle Eastern Pipe Line Co.*, PCB 99-191, 2001 WL 118207, at \*3 (Feb. 1, 2001). At the hearing in that case, the complainant moved to admit a letter from USEPA to the IEPA. *Id.* The letter provided guidance from USEPA regarding the prevention of significant deterioration (PSD) program. *Id.* Respondent Panhandle objected to the letter being admitted arguing foundation and hearsay among other things. *Id.* The hearing officer denied admission of the letter based upon the letter not being “a memorandum or record of an act, transaction[,] occurrence[,] or event.” *Id.* The Board affirmed the hearing officer’s ruling, finding that the complainant had not demonstrated that the letter was “admissible under the business record exception rule. It is not a memorandum or record of any act, transaction, occurrence, or event.” *Id.* at \*3.

23. In *Illinois v. Cyber America*, the PCB also looked at the business records exception to hearsay. PCB 97-8, 1998 WL 112482, at \*2 (March 5, 1998). The PCB states that “in order for records to be admitted under the business exception to the hearsay rule, the records had to have been routine and kept in the normal course of respondent's business.” *Id.* The exhibits at issue consisted of logs “maintained by security guards hired by CIC, which recorded the loads of tires removed from the facility by the State's contractor.” *Id.* at \*1. Complainant objected to these exhibits, arguing that the records were not created in the normal course of business. *Id.* at \*1. The records at issue in *Cyber America* were kept to track how many tires were removed by the State's contractor. The PCB concluded that “the records were not made in the normal course of CIC's business and [did] not constitute reliable evidence.” *Id.* at \*2.
24. Similarly, in the present case, Respondent also failed to demonstrate that Ex. 649 meets the requirements to be admissible under the business record exception rule. The present case is on point with the situation in *Illinois v. Panhandle*, in that the email in Exhibit 649 is not a memorandum or record of any act, transaction, occurrence, or event. The analysis and reasoning behind requirements of a CCA cannot be said to be an act, transaction, occurrence, or event. Further, similar to *Illinois v. Cyber America Corp.*, respondent offered no testimony it was IEPA's regular course of business for anyone at IEPA to make a record via email of the presence or absence of certain CCA conditions.
25. In sum, Respondent failed to establish, in the context of a hearsay objection, that the document clears hearsay's higher bar for admissibility as a public record or report or a business record. Ill. S.Ct. R. Evid. 803; 35 Ill. Admin. Code § 101.626(e).



26. Complainants object to the Hearing Officer's ruling on Exhibit 649, move to strike the testimony on the content of the exhibit (Jan. 30 Hr'g Tr. 173:13-174:24, 175:20-176:18), and appeal this ruling to the Board.

WHEREFORE, for the reasons stated above, Complainants respectfully request that the Board reverse the Hearing Officer's ruling on Exhibit 649, exclude Exhibit 649, and strike the testimony relating to the Exhibit.

Respectfully submitted,

/s/ Faith Bugel

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*Attorney for CARE*

Dated: March 21, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **COMPLAINANTS' OBJECTION TO AND APPEAL OF HEARING OFFICER'S RULING ON RESPONDENT'S EXHIBIT 649** was served electronically to all parties of record listed below on March 21, 2018.

Respectfully submitted,

/s/ Akriti Bhargava

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