

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 Response in Opposition to Complainants’ Motion *in Limine* to Exclude Portions of Gayle Koch’s Expert Report, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: March 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 and Midwest Generation, LLC's Response in Opposition to Complainants' Motion *in Limine* to Exclude Portions of Gayle Koch's Expert Report, a copy of which is hereby served upon you was filed on March 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 and Midwest Generation, LLC's Response in Opposition to Complainants' Motion *in Limine* to Exclude Portions of Gayle Koch's Expert Report were emailed on March 4, 2022 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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**MIDWEST GENERATION, LLC’S RESPONSE IN OPPOSITION TO
COMPLAINANTS’ MOTION *IN LIMINE* TO EXCLUDE PORTIONS OF GAYLE
KOCH’S EXPERT REPORT**

The Hearing Officer should deny Complainants’ motion because Ms. Koch’s opinions about Midwest Generation, LLC (“MWG”) are solely in response and rebuttal to the opinions issued by Complainants’ economic expert, Jonathan Shefftz, in which he opined that Complainants’ compliance costs and penalties are economically reasonable and affordable to MWG. MWG has separately requested that the Hearing Officer exclude Mr. Shefftz’s “affordability” opinions concerning MWG because economic reasonableness, as applied by the Board, does not consider the financial condition of a respondent.¹ If the Hearing Officer agrees that Mr. Shefftz’s opinions about MWG’s ability to afford Complainants’ purported costs and penalties should be excluded, then MWG agrees that Ms. Koch’s opinions in response/rebuttal are no longer necessary.

¹ See MWG’s Motion *in Limine* to Exclude Expert Opinion of Jonathan Shefftz, filed Feb. 4, 2022.

Complainants' motion should further be denied as yet another attempt to ask the Hearing Officer to reconsider his two previous Orders, and the Board Order, holding that financial information about MWG's indirect parent, NRG Energy, Inc., is irrelevant and excluded. Complainants' repeated requests about NRG have already been rejected by both the Hearing Officer (on a motion and subsequent request for reconsideration) and by the Board (on request for interlocutory appeal). The opinions at issue by Ms. Koch, solely in rebuttal to Mr. Shefftz, only concern MWG.

A. Ms. Koch's Opinions Respond to Mr. Shefftz's Opinions that MWG can "Afford" Complainants' Proposed Remedy and Proposed Penalty

Complainants' claim -- that they will somehow be prejudiced if they cannot rebut Ms. Koch's opinion -- is backwards. Ms. Koch's opinions on economic reasonableness (*not* ability to pay) are in direct rebuttal to Mr. Shefftz's repeated opinions about the financial condition of MWG. "Rebuttal evidence is admissible 'if it tends to explain, repel, contradict or disprove the evidence of [a witness].'" *Chapman v. Hubbard Woods Motors, Inc.*, 351 Ill. App. 3d 99, 106, 285 Ill. Dec. 569, 576 (1st Dist. 2004) *quoting Lagestee v. Days Inn Management Co.*, 303 Ill. App. 3d 935, 942, 709 N.E.2d 270, 276, 237 Ill. Dec. 284 (1999).

Here, Mr. Shefftz clearly and repeatedly opines that the compliance costs and penalties Complainants recommend are economically reasonable and that MWG can "afford" the costs. Mr. Shefftz's first expert report specifically reviewed MWG's financial condition (along with that of NRG, which was subsequently excluded), and Mr. Shefftz opined that "From this comparison, and from other financial indicators, my conclusion is that both the compliance costs and a penalty based on the full economic benefit amount, would be affordable." Shefftz Opinion (1/25/21) page 38. He based this opinion, in part, on his review of MWG's 2017 through 2019 financial statements. Shefftz Report, p. 29. As detailed below, Ms. Koch, in her expert report, specifically

responded to the Shefftz “affordability” opinion, but limited her opinion to only MWG. After the Hearing Officer agreed that NRG information should be excluded (for the second time), Mr. Shefftz issued his Supplemental Report replying to Ms. Koch’s opinion, where he repeated that the compliance costs and penalties “are economically justified and economically reasonable according to legal and engineering positions put forward by Petitioners’ counsel and engineering report.”² Shefftz Supplemental Report (7/16/21), p. 25 (emphasis added). Finally, in his Second Supplemental Report, which he issued after the Board denied all of Complainants’ efforts to include a discussion of NRG finances, Mr. Shefftz reviews only MWG’s finances and concludes that “both the compliance costs and a penalty based on the full economic benefit amount would be affordable” to MWG. Second Supplemental Report, (10/26/21) p. 1 (emphasis added). He explained in his deposition that his opinion that MWG could afford the compliance costs and remedy meant that he believed MWG had the ability to pay. Shefftz Dep. 13:16-20.

Ms. Koch’s opinion on MWG’s financial ability to afford certain costs, issued after Mr. Shefftz’s first report, is in direct response to Mr. Shefftz’s opinions. In fact, in her expert report, she opens her section titled “Economic Reasonableness” with a quote from Mr. Shefftz’s opinion to specifically rebut. Koch Report, (4/22/21) p. 27, attached as Ex. 1.³ She criticizes Mr. Shefftz for failing to consider that MWG voluntarily began the investigations of the ash ponds, voluntarily worked with Illinois EPA to study the Stations, and developed plans to achieve compliance. *Id.* She also criticizes Mr. Shefftz for failing to account for MWG’s bankruptcy in his calculations of affordability. Ex. 1, p. 28. Ms. Koch further explained in her deposition that the purpose of her

² The Shefftz Supplement Report expressly states that it must be read “in conjunction with my initial expert report,” – which included his opinion on affordability. Shefftz Supplemental Report (7/16/21), p. 1. In addition, Mr. Shefftz specifically does not update (or remove) his opinions about affordability in his Supplemental Report – despite the two rulings from the Hearing Officer -- because, he says, “I am refraining from updating this element of my expert opinion while Petitioners await a ruling from the Board on their appeal of the Order.” *Id.* at p 26.

³ The Koch Report is marked as Non-Disclosable Information (“NDI”) and the NDI information on the excerpted pages has been redacted. Accordingly, the exhibit does not need to be treated as NDI.

opinion was a critique of Mr. Shefftz's opinion on the costs and penalties he recommended. Koch Dep. p. 65:23-24, attached as Ex. 2.⁴ She opines that the costs and penalties suggested by Mr. Shefftz are unnecessary to come into compliance (Ex. 2, p. 71:7-9), and specifically states that her opinion is "a critique of Mr. Shefftz that he hasn't looked at these numbers. And this is very focused on his numbers, which I don't believe are valid." Ex. 2, 72:12-14.

Complainants' suggestion that MWG has made an ability to pay argument through these rebuttal statements by Ms. Koch is baseless. Equally baseless is Complainants' presumption that MWG *might*, at some point in the future, make such an argument. No one, not MWG nor Ms. Koch, has stated that MWG has an inability to pay for any remedy or penalty. In fact, Ms. Koch specifically states she was *not* making an ability to pay determination and was not asked to do so. Ex. 2. p. 82:3-4.⁵ Moreover, there is no remedy or penalty even decided by the Board – so the discussion is rather hypothetical in any case.

Because Mr. Shefftz concludes that the 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. To hold otherwise would allow Complainants to present opinions about MWG's ability to afford a penalty without MWG having the opportunity to respond. Regardless, and as discussed further below, all of Mr. Shefftz's opinions should be excluded. In that event, Ms. Koch's responsive opinions are no longer required.

⁴ Because the NDI information is redacted, Exhibit 2 does not need to be treated as NDI.

⁵ Although not at issue at this time, even if MWG were to claim an inability to pay, which it has not, any consideration of a non-party parent company is irrelevant. *Charter Hall Homeowner's Assoc. v. Overland Transportation System, Inc.*, PCB 98-81 (May 6, 1999). MWG is an indirect subsidiary of NRG. It is an accepted principle of law that a parent corporation is not liable for the acts of its subsidiaries. *United States v. Bestfoods*, 524 U.S. 51, 61, 118 S. Ct. 1876, 1884 (1998). In Illinois, to apply an exception to the rule of a separate corporate existence, a court is required to either pierce the corporate veil or find a subsidiary is merely an "alter-ego," both of which are high bars, and courts are admonished to undertake the tasks "reluctantly." *Ted Harrison Oil Co. v. Dokka*, 247 Ill.App.3d 791, 795 (1993).

B. The Shefftz Opinion that MWG can Afford to Pay Must be Excluded Because Economic Reasonableness is Based on the Costs of Suggested Remedies

As MWG stated in its Motion *in Limine* to exclude the Shefftz reports, Mr. Shefftz's opinion that MWG can afford to pay for Complainants' purported corrective actions and penalties must be stricken because it is irrelevant.⁶ Determining economic reasonableness or a corrective action under the Illinois Environmental Protection Act ("Act") does not consider the financial capacity of the defendant. The Third District of Illinois has stated that the plain text of Section 33(c) shows that "factors *other than a corporation's income*...are singled out as being determinative of economic reasonableness." *Allaert Rendering, Inc.*, 91 Ill. App. 3d 153, 158 (3rd Dist. 1980)(emphasis added). The Board has similarly not considered a respondent's financial condition when evaluating the economic reasonableness of a remedy. Instead, the Board looks to the environmental harm involved and compares the alternative remedial options available. In *Hoffman v. City of Columbia*, 1996 Ill. ENV LEXIS 716, the complainant sought a remedy that required the respondents to entirely remove respondents' facility, at a significant cost. The Board rejected that remedy, stating that the significant cost of relocating the facility was not economically reasonable. The Board did not engage in any consideration of the respondent's finances. *Id.*, *48. Rather, the Board compared the proposed remedy costs with the "type of interference [caused by the noise from respondent's operations] and the alternative control options," and found that more economically sound abatement measures better fit under the Act's reasonableness requirement. *Id.* at *48-49, *55.

⁶ See MWG's Motion *in Limine* to Exclude Jonathan Shefftz's Opinions, Feb. 4, 2022. As stated in MWG's motion, Shefftz's opinion, including his opinion on affordability, should be excluded because it is not based upon information typically relied upon by experts, does not aid the Board, and because economic reasonableness under the Act does not consider the financial capacity of the defendant, making his opinion even more irrelevant.

The case law is clear that a party's financial condition is not relevant to a determination of economic reasonableness of a remedy. MWG's financial condition and whether it can "afford" the costs of the purported remedy Complainants claim (even though the remedy appears to have been selectively withdrawn by Complainants' new expert) are not relevant. Mr. Shefftz's opinions that the remedy and penalty are "affordable" to MWG must be excluded. If the Hearing Offices agrees and excludes Mr. Shefftz's opinions on whether MWG can afford Complainants' compliance costs and penalties, then Ms. Koch's responsive opinions on MWG's future financial condition, prospects of coal plants, and ability to afford, are no longer required.⁷

C. Complainants' Motion is an End Run Around the Hearing Officer's and Board's Opinion Excluding NRG

Complainants' motion is an attempt to get a fourth bite at the "NRG apple," and should be summarily rejected. It is ironic that Complainants are attempting to revisit the three orders excluding Mr. Shefftz's opinions about NRG on the grounds that new facts (allegedly the Koch opinion) exist, while at the same time filing a Motion for Sanctions against MWG for making the very same claim – that new facts merit a stay. In both instances, there is no violation of a Board or Hearing Officer order, and no direct violation of Board rules – so MWG has not sought sanctions for Complainants' fourth attempt. Using Complainants' own language from their motion against MWG, it is clear that Complainants' request to relitigate the NRG issue "is frivolous, duplicative, and wastes the Board's and [MWG's] time and resources." The Hearing Officer has twice held and the Board confirmed on interlocutory appeal that consideration of NRG's finances is not relevant. The Hearing Officer found that, "complainants have not established NRG is responsible for the violations nor have they demonstrated that this information is relevant to the penalty."

⁷ Ms. Koch's opinions on MWG's historic financial condition are relevant and necessary because they form the basis of her economic benefit analysis and opinion in response to Mr. Shefftz's opinion on economic benefit.

Hearing Officer, April 13, 2021. The Board agreed with the Hearing Officer's opinion, finding that the "information regarding NRG's finances, as found in the Shefftz Opinion, are not relevant and should not be admitted at this time." Order, Sept. 9, 2021. Since the Hearing Officer's and Board's opinions, nothing has changed and no one has claimed MWG has an inability to pay. While it is evident that Complainants really do not like the Hearing Officer and Board Orders to exclude NRG financial information, there is no basis for a fourth attempt to revisit the orders.

D. CONCLUSION

Ms. Koch's opinions on economic reasonableness should not be excluded because they are in direct response and rebuttal to Mr. Shefftz's opinions. In any case, because economic reasonableness under the Act does not consider the financial capacity of a respondent, Mr. Shefftz's opinions on whether Complainants' costs and penalties are "affordable" are irrelevant and must be excluded. If his affordability opinions are excluded, then Ms. Koch's opinions in response are no longer necessary. Based on the above, Respondent, Midwest Generation, LLC respectfully requests that the Hearing Officer deny Complainants' Motion *In Limine*.

Respectfully submitted,

MIDWEST GENERATION, LLC.

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

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EXHIBIT 1

EXPERT REPORT
IN THE MATTER OF
SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, ET AL. V.
MIDWEST GENERATION, LLC
PCB 2013-15

Contains Non-Disclosable Information

Prepared by

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April 22, 2021

Economic Reasonableness

In his report, Mr. Shefftz states:

“Because not all violations are detected, prosecuted, and ultimately penalized, to achieve adequate deterrence, a civil penalty should also be adjusted by probability of detection, prosecution, and ultimate payment, as explained in further detail in my report. This is necessary to achieve the Board’s goal to, “deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act.” (415 ILCS 5/42 (from Ch. 111 ½, par. 1042), Sec. 42. Civil penalties, (h)(4))⁶⁵

This opinion ignores key factual points that are specific to this case:

- MWG did not construct the ash ponds at the four Stations at issue. Penalizing MWG for the construction and operations at these four Stations decades prior to its operations starting in 1999 does not deter further violations by the respondent.
- MWG voluntarily began investigating all of its ash ponds after it acquired them. MWG also voluntarily conducted sampling and self-reported the violations. MWG then worked with regulators to study the Stations and develop plans to achieve compliance with regulatory requirements, continuing to work on these issues even while in bankruptcy. It is unclear how extra penalties can additionally enhance or promote voluntary compliance with the Act, and may only serve to deter other parties from voluntary investigation and disclosure such as that conducted by MWG.
- It is unlikely that additional coal ash ponds will be built in the future, so the deterrent value for other parties is questionable. Also, Joliet 29 converted to natural gas in 2016, so there is no deterrent value at this Station regarding coal usage.

⁶⁵ J.S. Shefftz, Expert Opinion on Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs, January 25, 2021, p. 2.

[REDACTED]

[REDACTED] It is important to note that on December 17, 2012, Midwest Generation (and parent EME) filed for bankruptcy 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.”⁶⁶ MWG did not exit bankruptcy until 2014. Therefore, assessing large penalties related to noncompliance during this period is not economically reasonable.

[REDACTED]

[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Based on the current MWG financials, it would not be economically reasonable to expect MWG to bear Mr. Shefftz’s proposed compliance costs of \$219 million plus

⁶⁶ Edison Mission Energy and Midwest Generation, LLC, Form 10-K for the fiscal year ended December 31, 2013, (Callen Deposition Exhibit #3, March 31, 2016), p.8.

⁶⁷ Edison Mission Energy and Midwest Generation, LLC, Form 10-K for the fiscal year ended December 31, 2013,

[REDACTED]

[REDACTED]

[REDACTED]

EXHIBIT 2

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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CITIZENS AGAINST RUINING
THE ENVIRONMENT,
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V.
MIDWEST GENERATION, LLC,
Respondent.

ORAL AND VIDEOCONFERENCED DEPOSITION OF

GAYLE SCHLEA KOCH

OCTOBER 22, 2021

(Reported remotely.)

ORAL AND VIDEOCONFERENCED DEPOSITION OF

GAYLE SCHLEA KOCH, produced as a witness at the instance of
the Petitioner Sierra Club, and duly sworn, was taken in
the above-styled and -numbered cause on the 22nd day of
October, 2021, from 9:59 a.m. CDT to 1:34 p.m., before
Kelly Hassell, RPR, CLR, CSR, in and for the State of
Texas, reported by machine shorthand, located in Groton,
Massachusetts, in accordance with the Illinois Rules of
Civil Procedure and the agreement hereinafter set forth.

1 I don't want to put myself in their stead. They -- they
2 could. I only considered it in the second part.

3 Q (BY MR. WANNIER) Okay. And how did you consider
4 Midwest Generation's size for the second part which is the
5 overall 285 million?

6 A Well, I --

7 MS. GALE: Vague as to size. I don't know
8 what you mean there.

9 A Yeah. I'm going to point to what's in my report
10 which I considered, which is looking at Midwest Gen's
11 financials, that during the compliance period they were
12 actually -- or the -- not compliance period, the early
13 portion here, up until 2014, they were in bankruptcy. And

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED] so

22 I'm just presenting the information for the board to make
23 that determination. But the financials don't support the
24 level that Mr. Shefftz is recommending.

1 of 285 million to the financials of Midwest Generation; is
2 that correct?

3 A Yes, because they're tied, they're linked.

4 Q Okay.

5 A You don't get a penalty of 66 million unless you
6 believe the \$219 million scenario that Mr. Shefftz
7 proposed, so those two numbers have to go together. You
8 can't have one without the other.

9 Q Sure. Because as the compliance costs goes down,
10 the economic benefit of delay will also go down, correct?

11 A Correct.

12 Q Yeah. Okay. So my question is, as you are
13 comparing the overall \$285 million figure to the Midwest
14 Gen financials and you're stating that based on that
15 comparison, the \$285 million figure is economically
16 unreasonable, is it -- my question is, why is it
17 economically unreasonable?

18 MS. GALE: Objection; asked and answered.

19 A Yeah. This is -- what Shefftz is proposing is to
20 take three years of -- of net income just for the remedy
21 and the penalty, and by the time this is all resolved, it
22 would be more than that. So I have -- I have seen -- I've
23 worked on a lot of environmental bankruptcies. I have seen
24 many companies who cannot handle just the remedy portion of

Transcript of Gayle Schlea Koch
Conducted on October 22, 2021

1 that and then it defaults to the taxpayers to pay this kind
2 of thing.

3 So I take it from the Act that the board is
4 instructed to look at economic reasonableness that that is
5 not what is being attempted here, that we're not trying to
6 force the company into bankruptcy and ignore economic
7 reasonableness. It is -- specifically says to consider
8 that in both picking the remedy and in considering the
9 penalty.

10 So I think the numbers speak very clearly
11 for themselves, and I do present them here for the board to
12 consider. It's a critique of Mr. Shefftz that he hasn't
13 looked at these numbers. And this is very focused on his
14 numbers, which I don't believe are valid.

15 MS. GALE: I'm sorry. Did you -- court
16 reporter, did you get what she said?

17 THE COURT REPORTER: Which I believe are
18 valid.

19 THE WITNESS: No, which I don't believe are
20 valid.

21 THE COURT REPORTER: Thank you.

22 MR. WANNIER: Good catch, Kristen.

23 Q (BY MR. WANNIER) Is it your opinion -- sorry.
24 So I think you said -- you were talking about experience of

1 And if you're going to determine economic
2 reasonableness, you need to look at those other numbers.
3 I'm not making a determination on ability to pay. I
4 haven't been asked to.

5 Q (BY MR. WANNIER) [REDACTED]
6 [REDACTED]
7 [REDACTED]

8 MS. GALE: Objection; asked and answered.
9 And she's already answered how it's relevant. And
10 misstates testimony.

11 A The board is required to look at economic
12 reasonableness, both of remedy and the penalty. They are
13 going to want to look at the potential impact on the
14 company's financials as part of that. And there are many
15 other considerations that will come into play, but they
16 have to realize that 100 percent of the net income of the
17 company is not necessarily available just for the remedy at
18 these four locations and the penalty.

19 [REDACTED]
20 [REDACTED] They
21 probably want to look at additional information, but I'm
22 not the one that would provide that, [REDACTED]
23 [REDACTED] But I did want -- it was one very
24 large number. [REDACTED]