

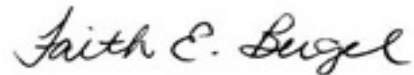
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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’ RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC’S MOTION *IN LIMINE* TO PRECLUDE EVIDENCE REGARDING NRG ENERGY, INC.**, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,



Faith E. Bugel
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Attorney for Sierra Club

Dated: March 4, 2022

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)	
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SIERRA CLUB, ENVIRONMENTAL)	
LAW AND POLICY CENTER,)	
PRAIRIE RIVERS NETWORK, and)	
CITIZENS AGAINST RUINING THE)	
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v.)	PCB No-2013-015
)	(Enforcement – Water)
MIDWEST GENERATION, LLC,)	
)	
Respondent.)	

COMPLAINANTS’ RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC’S MOTION *IN LIMINE* TO PRECLUDE EVIDENCE REGARDING NRG ENERGY, INC.

Pursuant to 35 Ill. Adm. Code 101.500, Complainants offer the following response to Midwest Generation, LLC’s Motion *in Limine* to Preclude Evidence Regarding NRG Energy, Inc. (“MWG’s Motion”).

As an initial matter, MWG’s Motion is overly broad and directly conflicts with the Board’s September 9, 2021, Order on Complainants’ motion for interlocutory appeal of the Hearing Officer’s Order granting MWG’s motion *in limine* to exclude sections of the Shefftz opinion. MWG’s February 10, 2021 Motion *In Limine* to Exclude Sections of Complainants’ Expert Report asked the Board to issue an order barring any “expert or witness from opining or testifying about any entity other than MWGen.” The Board expressly denied that portion of MWG’s motion, stating:

The Board denies Midwest’s request in its motion *in limine* to bar any witness from opining or testifying about an entity other than Midwest. Such a blanket request

expands far beyond the limited exclusion of NRG from the Shefftz report. NRG information is barred from the expert report but will be allowed to be introduced if Midwest makes an inability to pay argument. Any further request to bar testimony or evidence must be based on specific objections and explanations as to why that information may not be relevant.

Sept. 9, 2021 Order, at 8.

In defiance of the Board's unambiguous holdings, MWG's duplicative Motion seeks the same "blanket request" the Board previously denied. Though required to present "specific objections and explanations" in any future request to bar testimony or evidence, MWG's Motion does not identify any such testimony or evidence to be excluded, nor does it offer any new explanation regarding the need for or appropriateness of a blanket exclusion which has already been denied.

Moreover, the broad scope of MWG's Motion also disregards the Board's unambiguous holding that NRG information "will be allowed to be introduced if Midwest makes an inability to pay argument." Sept. 9, 2021 Order, at 8. Again, MWG seeks to relitigate this issue, hoping to get a different outcome. If granted, MWG's Motion would prejudice the Complainants by barring them from introducing evidence necessary to respond to or rebut any inability to pay argument made by MWG. And indeed, as explained in much more detail in 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"), MWG has now sought to introduce evidence in support of an inability to pay argument, in the form of portions of the Expert Report of Gayle S. Koch. This is precisely the situation contemplated by the Board in its September 9, 2021 Order. Given the statements in Ms. Koch's report, it would be particularly inappropriate, and inconsistent with previous rulings, to grant MWG's Motion for blanket preclusion at this time.

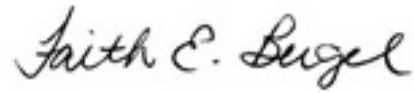
Even if the Board's unambiguous statement from its September 9, 2021 Order somehow did not control, the Hearing Office should nevertheless decline to decide MWG's Motion independently of other pending motions discussing the scope of evidence that may be before the Board as it conducts its economic reasonableness determination under Section 33(c). 415 ILCS 5/33(c). In particular, Complainants' Motion asks that the Hearing Officer 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. Resolution of Complainants' Motion could well impact the previous decision to exclude this information that serves as the principal basis for MWG's Motion here. MWG's Mot. at para. 5 (basing its request on the Hearing Officer's and Board's previous rulings relating to Mr. Shefftz's expert testimony).

Ultimately, the Hearing Officer will need to decide two interrelated questions in the context of the economic reasonableness determination: whether evidence—including expert testimony—may be offered on the topic of MWG's and NRG's financial and operational relationship; and whether evidence—including expert testimony—may be offered on the topic of MWG's financial situation and future prospects. For the reasons more fully articulated in Complainants' Motion, Complainants believe those two determinations must be resolved in parallel, i.e. the same decision should be reached on both counts.

For the reasons stated above, Petitioners Respectfully Request that the Hearing Officer deny MWG's Motion *in Limine* to Preclude Evidence Regarding NRG Energy, Inc. in its entirety.

Dated: March 4, 2022

Respectfully submitted,



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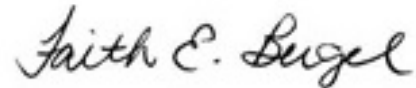
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CERTIFICATE OF SERVICE

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' RESPONSE TO MIDWEST GENERATION, LLC'S MOTION IN LIMINE TO PRECLUDE EVIDENCE REGARDING NRG ENERGY, INC.**, before 5 p.m. Central Time on March 4, 2022, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 7 pages.

Respectfully submitted,



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