

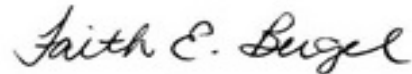
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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’ MOITION 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: February 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’ 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 101.500, Complainants hereby request that the Hearing Officer enter an Order granting their Motion in Limine to exclude the sections of Respondent’s Expert Opinion of Gayle S. Koch that opine as to Midwest Generation, LLC’s (“MWG’s”) ability to afford remedies and penalties that may be assessed against MWG in this matter. In the alternative, Complainants request that the Hearing Officer enter an Order reinstating the sections of Complainants’ Expert Opinion of Jonathan Shefftz that opine as to MWG’s close financial and operational relationship with its indirect parent corporation, NRG Energy, Inc. In support of this Motion, Complainants state as follows:

1. On February 10, 2021, MWG filed a Motion in Limine to exclude sections of Complainants’ Expert Report (“MWG Motion”), focusing on the sections of Complainants’ Expert Jonathan Shefftz’s report explaining the close operational and financial relationship

between MWG and its parent company, NRG Energy, Inc.¹

2. On April 13, 2021, the Hearing Officer in this proceeding granted MWG's Motion, based in part on his assertion that MWG had not yet put forth evidence or argumentation indicating that it may not be able to reasonably pay for certain remedies or penalties.²

3. On April 27, 2021, Complainants filed an interlocutory appeal requesting that the Board overturn the Hearing Officer's ruling on the MWG Motion.³ On May 11, 2021, Respondent filed a response to that appeal, in which it indicated that "MWG has not made a claim of inability to pay at this time."⁴

4. On September 9, 2021, the Board affirmed the Hearing Officer's 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." 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."⁵

5. Ms. Koch's expert report includes multiple allusions to MWG's financial situation, which appear in several different sections of her report.⁶ 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

¹ Midwest Generation, LLC's Mot. in Limine to Exclude Sections of Comp's Expert Rep. 2-3 (Feb. 10, 2021).

² H.O. Order at 5 (April 13, 2021).

³ Comp's Mot. for Interlocutory Appeal from H.O. Order Granting Mot. in Limine.

⁴ Midwest Generation LLC's Resp. to Comp's Mot. for Interlocutory Appeal from H.O. Order, at 3, n. 3.

⁵ Board Order at 8.

⁶ Gayle Schlea Koch Expert Rep. (April 22, 2021) (allusions to MWG's financial situation and references to economic reasonableness appear on pages 1-2, 6, 19, 24-25, and 27-29) (report attached hereto as Att. A).

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”.⁷ Each of these opinions was presented in the context of expert conclusions she offered that certain compliance and penalty costs “are not economically justified and are not economically reasonable.”⁸

6. 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.”⁹

7. Ms. Koch also testified at her deposition that the reasonableness determination “has multiple parts. The first part would be is it economically reasonable to spend \$219 million digging up these sites? And then the second part, is 285 million reasonable given Midwest Gen’s financials? . . . The . . . [size] of Midwest Gen comes into play in the second part.”¹⁰ Ms. Koch further testified that “the economic feasibility [determination] will look at the company’s financials and how big a number this is and whether it’s reasonable”; and that MWG’s “financials don’t support the [remedy and penalty] level that Mr. Shefftz is recommending.”¹¹

⁷ Gayle Schlea Koch Expert Rep. 28-29 (April 22, 2021).

⁸*Id.* at 29.

⁹ Koch Dep. Tr. 67:18-23 (Oct. 22, 2021) (transcript excerpts attached hereto as Att. B).

¹⁰ Koch Dep. Tr. 63:22-65:2 (including follow-up clarification).

¹¹ Koch Dep. Tr. 65:3-67:3, 69:5-6 (including follow-up clarification); *see also id.* at 70 (noting that she based her conclusion that “it would not be economically reasonable to expect MWG to bear [\$285 million in remedy and penalty costs]” in part on her opinion that the total amount “doesn’t fit with Midwest Gen’s financials It’s not economically feasible.”).

8. Ms. Koch's report includes a discussion of MWG's financial history and coal industry projections and a comparison to Mr. Shefftz's proposed remedy and penalty costs in the "economic reasonableness" portion of her report.¹² 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 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.

9. More broadly, Ms. Koch's reports 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 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."¹³

10. 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. 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. "Where [] evidence could be prejudicial, an order granting a motion in limine may be safer than an order

¹² Koch Expert Rep. 28-29.

¹³ Board Order at 8.

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, Respondent’s evidence relating to MWG’s financial situation will be prejudicial if Complainants are not allowed to fully rebut it.

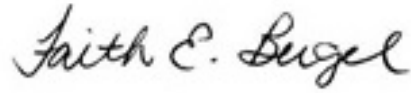
12. So long as Complainants are precluded from offering information demonstrating that MWG has clear and easy access to the financial resources of its indirect parent NRG, it would unduly bias the remedy proceeding to allow MWG to offer evidence and argumentation that MWG’s financial capabilities should limit the remedy and penalties in this case. Indeed, it is exactly this concern that prompted the Board to deny MWG’s request in the MWG Motion “to bar any witness from opining or testifying about an entity other than Midwest.”¹⁴ Thus, 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; or alternatively, 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.

WHEREFORE, for the reasons stated above, Complainants request that the Hearing Officer (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 in any way that compares the prospective cost of any remedy or penalties to the financial capabilities of MWG; or in the alternative that the Hearing Officer (3) reinstate the sections of Complainants’ Expert Opinion of Jonathan Shefftz that opine as to MWG’s close financial and operational relationship with NRG.

¹⁴ *Id.*

Dated: February 4, 2022

Respectfully submitted,



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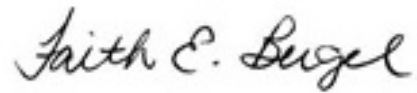
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CERTIFICATE OF SERVICE

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' MOITION IN LIMINE TO EXCLUDE PORTIONS OF RESPONDENT'S EXPERT REPORT, OR IN THE ALTERNATIVE TO REINSTATE PORTIONS OF COMPLAINANTS' EXPERT** before 5 p.m. Central Time on February 4, 2022, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 81 pages.

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