

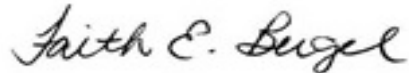
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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’ MOTION FOR LEAVE TO FILE, INSTANTER, THEIR REPLY TO RESPONDENT’S RESPONSE TO THEIR MOTION *IN LIMINE*, and COMPLAINANTS’ REPLY IN SUPPORT OF THEIR MOTION *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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(312) 282-9119
FBugel@gmail.com

Attorney for Sierra Club

Dated: March 18, 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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MIDWEST GENERATION, LLC,)	
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Respondent.)	

COMPLAINANTS’ MOTION FOR LEAVE TO FILE, *INSTANTER*, THEIR REPLY TO RESPONDENT’S RESPONSE TO THEIR MOTION *IN LIMINE*

Pursuant to Section 101.500(e) of the Illinois Pollution Control Board’s (“Board”) Procedural Rules, Complainants Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (“Complainants”) submit this Motion for Leave to File, *Instanter*, their Reply to Respondent MWG’s Response to their Motion *In Limine* to Exclude Portions of Respondent’s Expert Report, or in the Alternative to Reinstate Portions of Complainants’ Expert Report. 35 Ill. Adm. Code 101.500(e). A reply brief is warranted because MWG’s Response fundamentally mischaracterizes Complainants’ Motion and misconstrues the Board’s September 9, 2021 Order. In support of their motion, Complainants submit their Reply and state:

1. On March 4, 2022, MWG filed its Response to Complainants’ Motion *In Limine* to Exclude Portions of Gayle Koch’s Expert Report. MWG’s Response inaccurately construes Complainants’ motion as an attempt to relitigate issues decided by the Hearing Officer and Board and presents a selectively misleading account of applicable legal authorities.

2. First, MWG misleadingly characterizes Complainants' Motion as an attempt to relitigate an issue addressed in the Board's September 9, 2021 Order: the question of the admissibility of evidence pertaining to MWG's access to resources from its parent company NRG. In fact, Complainants' Motion merely seeks an equitable application of the Board's recognition in that Order that the issue of MWG's access to funds from NRG would need to be reevaluated if and when MWG raised the issue of its ability to pay. Because MWG's expert Ms. Koch presents evidence on MWG's ability to pay in her report, the terms of the Board's Order require a fresh consideration of the issue to ensure that Complainants are not prejudiced.

3. Second, MWG applies an overly narrow reading of the Board's Order by suggesting that only literal use of the phrases "ability to pay" or "inability to pay" could trigger the Board's holding that "[s]hould Midwest make an inability to pay argument in the future, or should the facts being considered change, the Board will consider it at that time and the Environmental Groups may then renew their request for admission of NRG's financial information." Board Order at 8-9, Sept. 9, 2021. The statements of MWG's expert at issue in Complainants' motion all go directly to the question of MWG's financial standing and the potential impact of compliance and penalty costs and therefore relate directly to the type of "inability to pay" argument contemplated by the Board.

4. Third, MWG seeks to justify inclusion of statements directly related to MWG's ability to pay by suggesting that the statements merely respond to portions of Complainants' expert reports, or address only Section 33(c) reasonableness factors. This argument misrepresents how those statements are actually used by Ms. Koch in her report, and ignores the fact that MWG will remain free to use those statements in support of whatever argument it may wish, including an inability to pay argument.

5. Complainants will suffer material prejudice if they are not permitted to reply in order to clarify the actual nature of their Motion, establish the applicability of the Board's Order, and explain how their ability to effectively advocate for their position will be compromised if MWG is allowed to present evidence regarding MWG's inability to pay while Complainants remain precluded from offering evidence regarding MWG's access to capital through its parent company NRG.

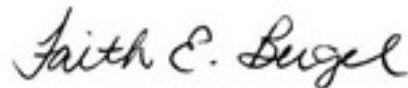
6. Complainants have prepared a Reply in support of their Motion *In Limine*, and have attached that Reply to this motion.

7. This Motion is timely filed on March 18, 2022, within fourteen days after service of MWG's Response, as required by 35 Ill. Admin. Code § 101.500(e).

WHEREFORE, Complainants respectfully request that the Hearing Officer grant Complainants' Motion for Leave to File, *Instanter*, their Reply to Respondent's Response to their Motion *In Limine* to Exclude Portions of Respondent's Expert Report, or in the Alternative to Reinstate Portions of Complainants' Expert Report, and accept the attached Reply as filed on this date.

Dated: March 18, 2022

Respectfully submitted,



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**COMPLAINANTS' REPLY IN SUPPORT OF THEIR MOTION *IN LIMINE*
TO EXCLUDE PORTIONS OF RESPONDENT'S EXPERT REPORT,
OR IN THE ALTERNATIVE TO REINSTATE PORTIONS OF
COMPLAINANTS' EXPERT REPORT**

Respondent MWG seeks to take advantage of the Board's September 9, 2021 Order in a manner that allows it to present evidence regarding MWG's financial status while at the same time precluding Complainants from presenting relevant and responsive evidence regarding MWG's close financial and operational relationship with NRG. In service of this goal, MWG's Response mischaracterizes both Complainants' Motion and the Board's Order. But the fact remains that MWG cannot have it both ways: either MWG must be precluded from offering evidence regarding its inability to pay for corrective measures and penalties, or Complainants must be allowed to offer their evidence regarding MWG's access to resources from NRG.

A. Complainants' Motion Seeks to Give Effect To—Rather than Relitigate—the Board's September 9, 2021 Order.

MWG mischaracterizes Complainants' Motion as no more than an attempt to relitigate an issue already decided by both the Hearing Officer and the Board. Midwest Generation, LLC's Resp. in Opp'n to Complainants' Mot. *in Limine* to Exclude Portions of Gayle Koch's Expert Report, at 6-7, March 4, 2022 ("MWG Resp.").¹ It is not. Instead, Complainants' Motion is the inevitable next step in the process initiated by MWG's original motion *in limine* to exclude those portions of Mr. Shefftz's report addressing the finances of NRG. Midwest Generation, LLC's Mot. *In Limine* to Exclude Jonathan Shefftz Op., Feb. 10, 2021. In its Order on Complainants' interlocutory appeal of the Hearing Officer's granting of that motion, the Board expressly recognized the potential that MWG would eventually assert an inability to pay argument, and invited Complainants to raise the issue at that time. Board Order, at 8-9, Sept. 9, 2021. Specifically, the Board held that "[s]hould Midwest make an inability to pay argument in the future, or should the facts being considered change, the Board will consider it at that time and the Environmental Groups may then renew their request for admission of NRG's financial information." *Id.* By presenting evidence in Ms. Koch's report regarding MWG's finances and its inability to pay, the "facts being considered" have changed such that these issues are now ripe.

MWG is laying the groundwork for an inability to pay argument, and Complainants will therefore be prejudiced if they are unable to offer evidence to counter MWG's assertions. Accordingly, Complainants had no choice but to file their Motion asking that either MWG's expert's testimony be excluded, or that Complainants be allowed to offer the type of counter

¹ MWG repeats this mischaracterization of Complainants' Motion in its Response to Complainants Motion for Sanctions. MWG's Resp. to Complainants' Mot. for Sanctions at 11-12 (Mar. 4, 2022).

evidence regarding MWG's ability to pay—including its ability to draw on resources from NRG—that the Board contemplated in its September 9, 2021 Order.

B. The Sections of Ms. Koch's Report Addressed in Complainants' Motion Speak Directly to MWG's "Ability to Pay."

MWG, in its Response, relies on an exceedingly narrow interpretation of the phrase "ability to pay" in an attempt to avoid triggering the explicit language of the Board's Order. *See* MWG Resp. at 2. Nothing in the Board's Order, or in any of the relevant case law, suggests that the specific phrases "ability to pay" or "inability to pay" are magic words that must be uttered in order to make relevant the issue of a respondent's access to resources from its corporate parent. What matters is that MWG, through its expert, has now presented facts and opinions that speak directly to MWG's financial standing and, therefore, its ability to pay.

Complainants' Motion identified several factual assertions made by Ms. Koch that go directly to the question of MWG's ability to pay. MWG's Response fails to explain why any of these statements do not relate to MWG's ability to pay. First, Complainants' Motion identifies Ms. Koch's statements that MWG 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,'" and that MWG did not emerge from bankruptcy until 2014. Complainants' Mot. *in Limine* to Exclude Portions of Gayle Koch's Expert Report, ¶ 5, Feb. 4, 2022 (quoting Koch Report at 28) ("Comp.'s Mot."); *see also* Koch Report (4/22/21) p. 28, attached as Ex. 1.² These statements go to the question of ability to pay because they

² MWG has marked the Koch Report as Non-Disclosable Information ("NDI"). MWG attached a redacted excerpt to its Response. Complainants' Exhibit 1 includes the non-redacted version of the pages from MWG's exhibit, as well as an additional page, and is stamped as containing NDI. Complainants will also file a public version of their Reply and exhibits that will redact all references to NDI contained within the Koch Report, both in the body of the Reply and in Exhibit 1.

present evidence regarding the economic headwinds facing MWG and other coal-fired energy providers, the narrow margins within the industry, and the potential for environmental compliance costs to tip the company into bankruptcy.

Next, Complainants' Motion identifies Ms. Koch's statement that MWG recently reported [REDACTED]. Comp.'s Mot. ¶ 5 (quoting Koch Report at 28). The environmental obligations listed by Ms. Koch include costs related to [REDACTED]

[REDACTED] Koch Report, Ex. 1 at 28. [REDACTED]

[REDACTED] *Id.* This statement speaks to MWG's ability to pay because it is plainly presented to demonstrate that [REDACTED]

Complainants' Motion further identifies Ms. Koch's statement that "current and forward-looking expectations for U.S. coal-fired power generation is not optimistic." Comp.'s Mot. ¶ 5 (quoting Koch Report at 29); Ex. 1 at 29. This statement goes to MWG's ability to pay because it suggests that the economic conditions that have already negatively impacted MWG are likely to continue into the future, and that therefore MWG will remain constrained in its ability to pay significant compliance or penalty costs.

Finally, Complainants' Motion identifies the final sentence of Ms. Koch's report, where she summarizes her opinion as finding that the compliance and penalty costs recommended by Mr. Shefftz "are not economically justified and are not economically reasonable." Comp.'s Mot. ¶ 5 (quoting Koch Report at 29); Ex. 1 at 29. Particularly when taken in the context of Ms.

Koch's immediately preceding statements discussed above, it is clear that Ms. Koch intends both the justifiability and the reasonableness of these costs to be interpreted through the lens of MWG's ability to pay.

Even if there could be any doubt as to whether Ms. Koch intended these statements from her report to speak to the question of MWG's ability to pay, such doubt is dispelled by Ms. Koch's statement at her deposition that "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." Comp.'s Mot. ¶ 6 (quoting Koch Dep. Tr. 67:18-23 (Oct. 22, 2021)); attached as Ex. 2.³

Ms. Koch's report and testimony are clear: She finds the costs recommended by Mr. Shefftz to be "not economically reasonable" (Koch Report, Ex. 1 at 29), and she defines reasonable as "what—can somebody reasonably economically pay." Koch Dep., Ex. 2, Tr. 67:18-23 (Oct. 22, 2021). In other words, MWG cannot reasonably pay the costs recommended by Mr. Shefftz. This is the "inability to pay" argument that the Board presented as a threshold for reevaluating the admissibility of NRG's financial information.

C. MWG Cannot Avoid the Implications of the Board's September 9, 2021 Order by Claiming that Ms. Koch's Statements are Offered for Purposes Other than Demonstrating MWG's Inability to Pay.

MWG seeks in its Response to excuse Ms. Koch's statements as merely rebuttal to Mr. Shefftz's report (MWG Resp. at 2-4), and as merely relating to the Section 33(c) reasonableness factors rather than the Section 42(h) penalty factors (*id.* at 5). In so doing, MWG seeks to avoid applicable Board precedent addressing what information the Board will consider in evaluating the Section 42(h) factors. MWG's ploy fails, however, both because it misrepresents the actual

³ Because portions of Ms. Koch's deposition may contain NDI, Complainants are treating the deposition excerpt provided here as Exhibit 2 as NDI.

way the statements are wielded in Ms. Koch's report, and because MWG has not limited the ways it can rely on those statements in the future.

MWG misleadingly characterizes the portions of Mr. Shefftz's report to which Ms. Koch was responding as merely addressing whether "MWG can 'afford' the costs." MWG Resp. at 2-4. This overly narrow reading ignores the fact that the statements in Ms. Koch's report implicated in the present motion *in limine* were offered specifically to address the section of Mr. Shefftz's report addressing the deterrence factor of Section 42(h)(4). That factor provides that the Board is authorized to consider "the amount of monetary penalty which will serve 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(h)(4) (2020). The statements of Ms. Koch at issue in Complainants' Motion *In Limine* are found primarily on pages 27 through 29 of the Koch Report. *See* Complainants' Mot. ¶ 5; Ex. 1 at 27-29. Ms. Koch introduces that section by quoting the finding from Mr. Shefftz's report that specifically addresses the 42(h)(4) deterrence factor. Koch Report, Ex. 1 at 27 (quoting Shefftz report at 2, quoting section 42(h)(4)).

That Ms. Koch's statements were made in response to Mr. Shefftz's assertions regarding the 42(h)(4) deterrence factor is relevant because the Board has previously rejected the argument "that the financial condition of [the Respondent] should be considered as a mitigating factor by the Board" under the 42(h)(4) factor. *Illinois v. ESG Watts, Inc.*, PCB 96-237, 1998 WL 83678, at *9 (Feb. 19, 1998) (refusing to consider evidence of respondent's financial condition and instead "assess[ing] a penalty that will dissuade [the respondent] from future business decisions that result in violations."). Under this approach, the portions of Ms. Koch's report responding to Mr. Shefftz's 42(h)(4) analysis should be excluded.

Alternatively, if the Board determines that it is appropriate in the present case to consider evidence relating to MWG's financial condition in the context of the Section 42(h)(4) factor, then the Board should characterize this as an "inability to pay" argument and—under the terms of its September 9, 2021 Order—allow Complainants to introduce the previously excluded portions of Mr. Shefftz's report that address NRG's finances. *See Illinois v. Kershaw*, PCB 92-164, 1995 WL 249614, at *8 (April 20, 1995) (Board accepting argument that under 42(h)(4), "a discussion of penalties that provide deterrence necessarily centers on the violator's ability to pay a penalty"); *IEPA v. Barry*, PCB 88-71, 1990 WL 271319, at *42 (May 10, 1990) (Board citing with approval the Ohio Supreme Court's approach to penalty considerations and finding that "ability to pay is relevant to whether a penalty may achieve the desired deterrent effect and eliminate any financial incentive to violate the law.")

Rather than acknowledge the ways in which Ms. Koch's statements relate to the Section 42(h) penalty factors, MWG in its Response seeks to suggest that Ms. Koch's statements present information relevant only to a Section 33(c) reasonableness determination. MWG Resp. at 5. Even setting aside the actual context within which Ms. Koch's statements were made, the two authorities that MWG cites as support for its assertion that the Board "does not consider the financial capacity of the defendant" (*id.*) when making an economic reasonableness determination under Section 33(c) do not support the further argument that a respondent's ability to pay is not relevant to the Board's penalty determination under Section 42(h). That's because the circumstances of the cases giving rise to the decisions cited by MWG prevented the Board from considering the Section 42(h) factors, and meant that the Board only considered the Section 33(c) reasonableness factors. In the first decision, *Allaert Rendering, Inc. v. Illinois Pollution Control Bd.*, (91 Ill. App. 3d 153 (3rd Dist. 1980)), the Board did not discuss the Section 42(h)

factors because that decision predates by 10 years the codification of those factors. *See ESG Watts, Inc. v. Illinois Pollution Control Bd.*, 282 Ill. App. 3d 43, 52 (1996) (“Section 42(h) is a recent addition to the Act which became effective September 7, 1990”). In the second decision, *Hoffman v. City of Columbia*, the Board determined that the Section 42(h) factors did not apply because “no civil penalties were requested,” and proceeded to consider only the Section 33(c) factors. PCB 94-146, 1996 WL 633343, at *17 (Oct. 17, 1996). Neither of those circumstances apply to the present case.

Even if an argument made in the context of the Section 42(h) penalty factors could somehow be characterized as other than an inability to pay argument, MWG has not offered any indication that it will refrain from relying on those sections of Ms. Koch’s report for other purposes. Ms. Koch’s statements must be evaluated based solely on the information they contain, not on the context in which they were presented. As described in detail in section B. above, each of the statements Complainants’ Motion seeks to exclude speaks to the past, present, or anticipated future financial condition of MWG. Unless they are excluded, those statements will remain available for MWG to cite in support of an inability to pay argument, and Complainants will be prejudiced by their limited ability to respond.

CONCLUSION

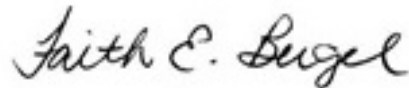
For all of these reasons—including as stated in Complainants’ Motion *In Limine* to Exclude Portions of Respondent’s Expert Report, or in the Alternative to Reinstate Portions of Complainants’ Expert Report—Complainants respectfully request that the Hearing Officer (1) strike all references to MWG’s financials from the Koch Report,⁴ and (2) enter an order barring

⁴ The specific portions of the Koch Report that Complainants seek to exclude are identified in footnote 6 of Complainants’ Motion *In Limine* to Exclude Portions of Respondent’s Expert Report, or in the Alternative to Reinstate Portions of Complainants’ Expert Report. Complainants’ Mot. at 2, n.6.

Ms. Koch or any other expert or witness from opining or testifying in any way that compares the prospective cost of any remedy or penalty to the financial capability of MWG; or—in the alternative—(3) reinstate the sections of Complainants' Expert Opinion of Jonathan Shefftz that opine as to MWG's close financial and operational relationship with NRG.

Dated: March 18, 2022

Respectfully submitted,



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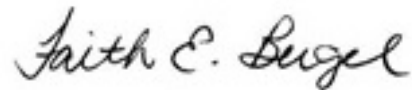
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CERTIFICATE OF SERVICE

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' MOTION FOR LEAVE TO FILE, INSTANTER, THEIR REPLY TO RESPONDENT'S RESPONSE TO THEIR MOTION IN LIMINE, and COMPLAINANTS' REPLY IN SUPPORT OF THEIR MOTION IN LIMINE TO EXCLUDE PORTIONS OF RESPONDENT'S EXPERT REPORT, OR IN THE ALTERNATIVE TO REINSTATE PORTIONS OF COMPLAINANTS' EXPERT REPORT** before 5 p.m. Central Time on March 18, 2022, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 24 pages.

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Exhibit 1

(Excerpt from Koch Report)

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

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]

[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,

economic benefit of \$66 million for a total cost of \$285 million. Beyond the 2019 financials, current and forward-looking expectations for U.S. coal-fired power generation is not optimistic. Coal-fired power generation fell to a 42-year low in 2019, and fell an additional 30 percent during the first half of 2020. The recent pandemic had some effect on this decline, but the major reasons focus on competition from natural gas and growing use of renewables. The extraordinary compliance and penalty levels proffered by Mr. Sheftz are not economically justified and are not economically reasonable.

CONCLUSION

Mr. Sheftz's analysis of compliance costs and economic benefits totaling \$285 million is both faulty and economically unreasonable. My opinions are made with a reasonable degree of certainty in my field.



Gayle Schlea Koch

4/22/2021

Date