

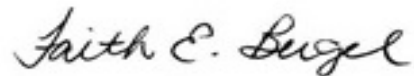
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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' OBJECTION TO AND APPEAL OF HEARING OFFICER'S RULING ON MWG'S MOTION *IN LIMINE* TO PRECLUDE EVIDENCE REGARDING NRG ENERGY, INC.**, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,



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Attorney for Sierra Club

Dated: July 27, 2022

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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COMPLAINANTS’ OBJECTION TO AND APPEAL OF HEARING OFFICER’S RULING ON MWG’S MOTION *IN LIMINE* TO PRECLUDE EVIDENCE REGARDING NRG ENERGY, INC.

Pursuant to 35 Ill. Adm. Code 101.502, Sierra Club, Environmental Law & Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (“Complainants”) submit this objection to one of the Hearing Officer’s rulings on a motion *in Limine* in the above-captioned matter and appeal to the Illinois Pollution Control Board (the “PCB” or “Board”). In support of their objection and appeal, Complainants state as follows:

1. On February 4, 2022, MWG filed “MWG’s Motion *in Limine* to Preclude Evidence Regarding NRG Energy, Inc.” (“MWG’s Motion”). MWG’s Motion sought to preclude Complainants from offering any evidence regarding the relationship between MWG and its parent, NRG Energy, Inc. (NRG), the financial condition of NRG, and any impact payment of a penalty might have on NRG. MWG’s Mot., at 1. Complainants filed a response opposing that Motion.

2. On July 13, 2022, Hearing Officer Halloran granted MWG's motion *in Limine* to preclude evidence regarding NRG Energy. Hearing Officer Order, *Sierra Club, et al. v. Midwest Generation, LLC*, PCB No. 13-15 (July 13, 2022).

3. Hearing Officer Halloran's Order stated that "[t]he Board [h]as already addressed this issue in affirming my April 13, 2021, Order holding that NRG's financials are not relevant. *Sierra Club, et al. v. MWG*, PCB 13-15 slip op. 2. (September 9, 2021). The Board found that the [C]omplainants 'have not yet demonstrated the relevance of NRG's finances. Should the facts being considered change, and should the Environmental Groups make a future argument regarding the relevance of NRG's finances, the Board will consider it at that time.' *Id.* at 7." Hearing Officer Order at 11 (July 13, 2022).

4. The Hearing Officer's Order on precluding evidence regarding NRG directly contradicts 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. In its September 9, 2021 Order, the Board stated that "[t]he financial information of NRG, a non-party to the case, is not relevant at this time. Should 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." Sept. 9, 2021 Order, at 8 – 9 (emphasis added). The Board also denied MWG's request to bar any witness from testifying about an entity other than MWG. "Such a blanket request expands far beyond the limited exclusion of NRG from the Shefftz report." *Id.* at 8.

5. The Hearing Officer erred in granting a blanket exclusion contrary to the Board's September 9, 2021 Order, in failing to address the facts that have changed, and in failing to

adhere to the Board's decision to treat MWG's arguments as opening the door to financial information about NRG. 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. Gayle Schlea Koch, Expert Report in the Matter of Environmental Law and Policy Center et al. C. Midwest Generation, LLC, PCB No. 13-25, at 1-2, 6, 19, 24-25, 27-29 (April 22, 2021).

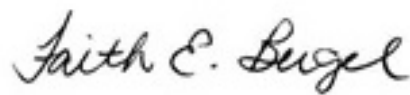
6. Considering that MWG's expert's testimony, portions of the Expert Report of Gayle S. Koch, includes an inability to pay argument, Complainants have demonstrated the relevance of NRG's finances and the Board should reconsider its previous ruling and reverse the Hearing Officer's ruling.

7. By failing to give effect to the portion of the Board's prior order now triggered by MWG's introduction of evidence regarding its inability to afford the penalty or remedy sought by Complainants, the Hearing Officer has imposed conditions for the hearing that unfairly disadvantage Complainants, deprive the Board of information relevant to its decision, and that run counter to fundamental principles of judicial efficiency.

WHEREFORE, for the reasons stated above, Complainants request that the Board reverse the Hearing Officer's ruling granting MWG's motion *in limine* to preclude evidence regarding NRG Energy, and hold that the facts have changed and the relevance of NRG's finances has been demonstrated.

Dated: July 27, 2022

Respectfully submitted,



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MEMORANDUM IN SUPPORT OF COMPLAINANTS’ OBJECTION TO AND APPEAL OF HEARING OFFICER’S RULING GRANTING MWG’S MOTION IN LIMINE TO PRECLUDE EVIDENCE REGARDING NRG ENERGY, INC.

MWG filed “MWG’s Motion *in Limine* to Preclude Evidence Regarding NRG Energy, Inc.” (“MWG’s Motion”) seeking to preclude Complainants from offering any evidence regarding the relationship between MWG and its parent, NRG Energy, Inc. (NRG), the financial condition of NRG, and any impact payment of a penalty might have on NRG. MWG’s Mot., at 1. Hearing Officer Halloran granted MWG’s motion *in limine* on the grounds that Complainants “have not yet demonstrated the relevance of NRG’s finances.” Hearing Officer Order, *Sierra Club, et al. v. Midwest Generation, LLC*, PCB No. 13-15, at 11 (July 13, 2022). The Hearing Officer’s Order directly contradicts the Board’s September 9, 2021 Order on Complainants’ motion for interlocutory appeal which stated “Such a blanket request expands far beyond the limited exclusion of NRG from the Shefftz report.” Board Order, at 8 (Sept. 9, 2021). In addition, portions of MWG’s expert’s testimony, the Expert Report of Gayle S. Koch, include an inability to pay argument, which demonstrates the relevance of NRG’s finances. Gayle Schlea

Koch, Expert Report in the Matter of Environmental Law and Policy Center et al. C. Midwest Generation, LLC, PCB No. 13-25, at 1-2, 6, 19, 24-25, 27-29 (April 22, 2021) (“Koch Expert Report”). For these reasons, the Board should reconsider its previous ruling and reverse the Hearing Officer’s ruling.

I. Legal Standard

The standard for admissibility of evidence at an Illinois Pollution Control Board (PCB) hearing is, in accordance with Section 10-40 of the IAPA, “[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). This is a “relaxed standard.” *People v. Atkinson Landfill Co.*, PCB No. 13-28, slip op. at 9 (Jan. 9, 2014).

II. Argument

On February 4, 2022, MWG filed “MWG’s Motion *in Limine* to Preclude Evidence Regarding NRG Energy, Inc.” (“MWG’s Motion”). MWG’s Motion sought to preclude Complainants from offering any evidence regarding the relationship between MWG and its parent, NRG Energy, Inc. (NRG), the financial condition of NRG, and any impact payment of a penalty might have on NRG. MWG’s Mot., at 1. The Hearing Officer granted this motion. Hearing Officer Order, at 11 (July 13, 2022). As an initial matter, the Hearing Officer’s Order directly conflicts with, and is far broader than, 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.” MWG’s Motion *in Limine* to Exclude Sections of Complainants’ Expert Report and Expedited

Motion for Stay Pending the Board's Decision, at 5. 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 holding, MWG's February 4, 2022 Motion seeks the same "blanket request" the Board previously denied. Though the September 9, 2021 Order requires MWG 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. Nor does the Hearing Officer's Order identify any "specific objections and explanations" to justify the blanket prohibition on evidence related to NRG, Energy Inc. In fact, the only circumstance that has changed since the Board's September 9, 2021 Order is that MWG has now introduced evidence in support of an inability to pay argument.

Although the Hearing Officer's Order purports to leave the door open for Complainants to move at the remedy hearing "to offer evidence that MWG can draw on NRG's financial resources" (Hearing Officer Order, at 11 (July 13, 2022)), deferring this decision only guarantees an unnecessarily contentious and inefficient hearing. There is no need to allow the remedy hearing to become bogged down in motions and oppositions and appeals, when MWG has already 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. Koch Expert Report, at 1-2, 6, 19, 24-25, 27-29. 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 allow the Hearing Officer's decision on MWG's Motion for blanket preclusion to stand. *See* Complainants' Memorandum in Support of Complainants' Objection to and Appeal of Hearing Officer's Ruling on Complainants' Motion *in Limine* to Exclude Portions of Respondent's Expert Report, or in the Alternative to Reinstate Portions of Complainants' Expert Report, PCB No. 13-15 (July 27, 2022) (filed in concurrence with this motion with a detailed discussion of Ms. Koch's testimony triggering the Board's ruling in the Board's Sept. 9, 2021 Order).

The Board should consider Complainants' appeal of the Hearing Officer's Order on MWG's Motion as interrelated to other pending appeals discussing the scope of evidence that may be before the Board as it conducts its economic reasonableness and deterrence determinations under Sections 33(c) and 42(h). 415 ILCS 5/33(c), 42(h). In particular, the Board should consider Complainants' Objection to and Appeal of Hearing Officer's Ruling on Complainants' Motion *in Limine* to Exclude Portions of Respondent's Expert Report, or in the Alternative to Reinstate Portions of Complainants' Expert Report, filed concurrently with this appeal. Taking the issues raised in these two appeals together, the Board should 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. and allow Complainants to introduce additional evidence regarding NRG as necessary to rebut MWG's inability to pay argument. Resolution of Complainants' Motion *in Limine* to Exclude

Portions of Respondent's Expert Report, or in the Alternative to Reinstate Portions of Complainants' Expert Report could well impact the previous decision to exclude this information that serves as the principal basis for MWG's Motion here. *See* MWG's Mot. at 2-3 (basing its request on the Hearing Officer's and Board's previous rulings relating to Mr. Shefftz's expert testimony).

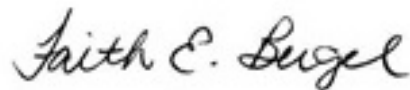
Ultimately, the Board will have to decide two interrelated questions in the context of the economic reasonableness determination: whether Complainants may offer evidence—including expert testimony—on the topic of MWG's and NRG's financial and operational relationship; and whether MWG may offer evidence—including expert testimony—on the topic of MWG's financial situation and purported constraints on its ability to afford certain penalties and remedies. For the reasons more fully articulated in Complainants' Appeal of the Hearing Officer's Order on Complainants' Motion, Complainants believe those two determinations must be resolved in parallel, *i.e.* the same decision should be reached on both counts.

III. Conclusion

For the reasons stated above, Petitioners respectfully request that the Board reconsider its previous ruling and reverse the Hearing Officer's ruling on "MWG's Motion *in Limine* to Preclude Evidence Regarding NRG Energy, Inc."

Dated: July 27, 2022

Respectfully submitted,



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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' OBJECTION TO AND APPEAL OF HEARING OFFICER'S RULING ON MWG'S MOTION IN LIMINE TO PRECLUDE EVIDENCE REGARDING NRG ENERGY, INC. and MEMORANDUM IN SUPPORT** before 5 p.m. Central Time on July 27, 2022, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 12 pages.

Respectfully submitted,

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