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
Illinois Pollution Control Board
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC's Redacted Combined Response to Complainants' Motions for Interlocutory Appeals from the Hearing Officer Orders Regarding NRG Energy, Inc. and Related Portions of Gayle Koch's Expert Report which does not contain Non-Disclosable Information, a copy of which is hereby served upon you. The Combined Response with Non-Disclosable Information and Exhibits have been mailed to the IPCB, Don Brown.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: August 10, 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 for Midwest Generation, LLC's Combined Response to Complainants' Motions for Interlocutory Appeals from the Hearing Officer Orders Regarding NRG Energy, Inc. and Related Portions of Gale Koch's Expert Report without Non-Disclosable Information and Exhibits, a copy of which is hereby served upon you was filed on August 10, 2022 with the following:

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605

and that true copies of the Combined Response with the Non-Disclosable Information and Exhibits were emailed on August 10, 2022 to the parties listed on the foregoing Service List. The Combined Response with Non-Disclosable Information and Exhibits has been mailed to the IPCB, Don Brown.

/s/ Jennifer T. Nijman

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v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

MIDWEST GENERATION, LLC'S COMBINED RESPONSE TO COMPLAINANTS' MOTIONS FOR INTERLOCUTORY APPEALS FROM THE HEARING OFFICER ORDERS REGARDING NRG ENERGY, INC. AND RELATED PORTIONS OF GAYLE KOCH'S EXPERT REPORT

The Hearing Officer correctly granted Midwest Generation LLC's ("MWG's") Motion *in Limine* to exclude irrelevant financial information about MWG's indirect parent, NRG Energy Inc. ("NRG"); and the Hearing Officer correctly denied Complainants' Motion *in limine* concerning opinions made by MWG's economic expert (Gayle Koch) because Ms. Koch's rebuttal opinions about MWG's finances did not open the door to NRG. Because Complainants' Appeals are interrelated and because both of the Hearing Officer's decisions rely upon the Board's September 9, 2021 order, MWG responds to both of Complainants' appeals (the "NRG Appeal" and "Koch Appeal")[1] in this Response.

[1] Complainants' motions for appeal are titled: (1) Complainants' Objection to and Appeal of Hearing Officer's Ruling Granting MWG's Motion *in Limine* to Preclude Evidence Regarding NRG Energy, Inc. (referred to herein as the "**NRG Appeal**"); and (2) 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 (referred to herein as the "**Koch Appeal**")

Both of Complainants' appeals (and their underlying memoranda) are entirely contingent on their speculation that in the future MWG might make a claim of inability to pay. There is no basis for that speculation, and the Board and Hearing Officer have repeatedly rejected it. Complainants' appeals misrepresent the Hearing Officer's July 13, 2022 Order and rehash previously defeated arguments. Contrary to Complainants' assertions, in his July 13th Order, the Hearing Officer did *not* make a blanket prohibition of the potential to allow evidence related to NRG, but stated that evidence regarding the relationship between MWG and NRG might be allowed only if Complainants demonstrate the relevance of NRG's finances, which Complainants have not done. This is the same limitation both the Hearing Officer and the Board made when they first decided this issue on September 9, 2021 and excluded NRG financial information from Complainants' expert's report. Both of Complainants' appeals should be denied and the Hearing Officer's decisions upheld.

I. Evidence of "Economic Reasonableness" Does Not Equate to Inability to Pay

Complainants' appeals hinge on a speculation that MWG will in the future make an inability to pay claim. Koch Appeal, p. 6., NRG Appeal, p. 3-4. This is not based in any fact. No one, not MWG nor Ms. Koch, has stated that MWG has an inability to pay for a 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. Koch Dep., p. 82:3-4, relevant excerpt attached as Ex. 1.

The Board reached this same conclusion in its September 9, 2021 order stating "Midwest has not put forth an inability to pay argument at this time." Sept. 9, 2021 Board Order, p. 8. The Hearing Officer similarly found that MWG has not made an inability to pay argument. H.O. July 13, 2022 Order, pp. 10-11. Nothing has changed between the Board's September 9, 2021 order and today. Because MWG still has not put forth an inability to pay argument, the Board's

conclusion that it "is therefore inappropriate to consider NRG's financials" continues to be accurate and Complainants' appeals that rely solely upon the incorrect speculation must be denied.

On the one hand, Complainants argue that the issue of "reasonableness" should be considered as part of the Board's analysis of 33(c) and 42(h) factors, (NRG Appeal, p. 4; Koch Appeal, p. 8); yet on the other hand Complainants seemingly refuse to allow Ms. Koch to be permitted to rebut testimony on that very point – whether a remedy and penalty is reasonable as it concerns MWG.[2] Ms. Koch never refers to NRG in her reasonableness statements. Without basis, and contrary to their own statement that reasonableness is a consideration, Complainants try to suggest that Ms. Koch must have been referring to inability to pay. As detailed below, the Hearing Officer was correct in his July 13th Order, stating that "Ms. Koch's report was merely rebutting Mr. Shefftz's report regarding MWG's *ability* to pay." H.O. July 13, 2022 Order, p. 14 (emphasis added).

Both of Complainants appeals point to rebuttal testimony of Ms. Koch to argue that MWG might somehow, in the future, be making an inability to pay argument. Not only is Complainants' argument premature, but Complainants conveniently leave out the context and basis for Ms. Koch's opinions on economic reasonableness. Her opinions 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).

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[2]As the Board is aware, Section 33(c) requires the Board to consider whether a selected corrective action is economically reasonable (Hoffman v. City of Columbia, PCB94-146 (Oct. 17, 1996) 1996 Ill. ENV LEXIS 716) (see Section IV below); and an Illinois Court recently held that penalties must be "reasonably calculated to aid the purposes of the Act as discussed in Section 42(h)" and to serve the goal of compliance without "being unduly punitive and excessive." *People ex rel. Raoul v. Lincoln, Ltd.*, 2021 IL App (1st) 190317-U, ¶ 36. (Because this case was filed under IL Sup. Ct. R. 23 after January 2021, it may be cited for persuasive purposes. IL. Sup. Ct. R. 23(e)).

As an initial matter, MWG's financial condition is irrelevant to these proceedings where there is no claim of inability to pay (see Section IV below), and MWG specifically reserves its objections to relevancy in the event Complainants seek to enter such evidence into the hearing record. That said, in each of the opinions issued by Complainants' expert, Mr. Shefftz, he clearly and repeatedly opines that the compliance costs and penalties Complainants recommend are economically reasonable and that MWG can "afford" the costs.[3] Mr. Shefftz's first expert report specifically reviewed MWG's financial condition (along with that of NRG, which was subsequently excluded by the Hearing Officer and affirmed by the Board), 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), p. 38.[4] He based this opinion, in part, on his review of MWG's 2017 through 2019 financial statements. *Id.* As detailed below, Ms. Koch, in her expert report, specifically responded to the Shefftz "affordability" opinion, and expressly limited her opinion to only MWG. After the Hearing Officer agreed that NRG information should be excluded (for the second time), Mr. Shefftz issued a Supplemental Report, 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." Shefftz Supp. Report (7/16/21), p. 25 (emphasis added). Then, in yet another Supplemental Report, which he issued

[3] Mr. Shefftz's opinions are based on a remedy Complainants have withdrawn, so his opinions on MWG's ability to "afford" the remedy are irrelevant and do not aid the Board. Complainants' replacement groundwater expert (Mr. Quarles) testified that he is not suggesting a remedy and has no intention to suggest a remedy. *See* Ex. 4 of MWG Quarles Appeal, pp. 86:24-87:10, 106:17-19. MWG's appeals of the Hearing Officer's denial of its motions to exclude Complainants' experts Mr. Quarles and Mr. Shefftz more thoroughly explains how Complainants' experts' opinions are inconsistent and incongruent. *See* MWG's Appeal from Hearing Officer's Rulings Allowing Quarles's Opinions and Redacting Quarles's Notes, July 27, 2022 and MWG's Appeal of the Hearing Officer's Ruling Denying its Motion *in Limine* to Exclude Jonathan Shefftz's Opinions, July 27, 2022.

[4] Mr. Shefftz reports contain Non-Disclosable Information. For the Board's reference, MWG filed each of his reports as Exhibit 3 (Shefftz Opinion, 1/25/201), Exhibit 4 (Shefftz Supp. Report, 7/16/21), and Exhibit 5 (Shefftz Second Supp. Report, 10/26/21) to MWG's Midwest Generation, LLC's Appeal of the Hearing Officer's Ruling Denying its Motion in Limine to Exclude Jonathan Shefftz's Opinions and underlying Memorandum on July 27, 2022."

after the Board denied all of Complainants' efforts to include a discussion of NRG finances, Mr. Shefftz reviewed only MWG's finances and opined that "both the compliance costs and a penalty based on the full economic benefit amount would be *affordable*" to MWG. Second Supp. 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. 134:16-20, relevant excerpt attached as Ex. 2.

Ms. Koch's opinions on MWG's financial ability to afford certain costs, issued after Mr. Shefftz's first report, are in direct response to Mr. Shefftz's opinions. 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, relevant excerpt attached as Ex. 3.[5] She criticizes Mr. Shefftz for failing to consider several factors in his calculations, including 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.*. Ms. Koch further explained in her deposition that the purpose of her opinion was a critique of Mr. Shefftz's opinion on the costs and penalties he recommended. Ex. 1, p. 65:23-24. She opines that the costs and penalties suggested by Mr. Shefftz are unnecessary to come into compliance (Ex. 1, 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. 1, p. 72:12-20.

If Mr. Shefftz is permitted to submit opinions that compliance costs and penalty are "economically reasonable" and "affordable" to MWG based on its finances, Ms. Koch's opinions in response regarding MWG's financial condition must be allowed. To hold otherwise would allow

[5] The Koch Report is marked as Non-Disclosable Information ("NDI") but the excerpt does not contain NDI, so the exhibit does not need to be treated as NDI.

Complainants to present irrelevant opinions about *MWG's* ability to afford a penalty without MWG having the opportunity to respond.[6]

MWG has appealed the Hearing Officer's denial of MWG's motion to exclude all of Mr. Shefftz's opinions. If the Board reverses the Hearing Officer's order, as it should, then Ms. Koch's responsive opinions are no longer required.

II. NRG's Finances are Not Relevant and Nothing Has Changed that Finding.

In their NRG Appeal, Complainants make the remarkable and baseless claim that the Hearing Officer defied the Board's September 9, 2021 Order and made a blanket preclusion of evidence related to NRG, thus suggesting that a blanket preclusion prevents the possibility that NRG's finances might be still relevant in the future. Complainants blatantly misrepresent MWG's request in its Motion *in Limine* to Preclude Evidence Regarding NRG ("MWG's NRG Motion"), and Complainants further misrepresent the Hearing Officer's Order. MWG did *not* request, and the Hearing Officer did not grant, a blanket prohibition of evidence related to NRG. MWG limited its request to "evidence regarding the relationship between MWG and its indirect parent company, NRG, NRG's financial condition, and any potential economic impact on NRG of a penalty or compliance costs." MWG NRG Mot., ¶5. These were the same topics that the Board and the Hearing Officer reviewed in 2021 and held were not relevant when the Hearing Officer and Board granted MWG's NRG Motion to exclude opinions made by Complainants' economic expert (J. Shefftz) about NRG. *See* H.O. April 13, 2021 Order; Sept. 9, 2021 Board Order.

The Hearing Officer's July 13th Order specifically relied on the Board's analysis in their September 9, 2021 Order. The Hearing Officer states, the "Board [has] already addressed this issue

[6] As discussed in Section IV below, until a claim is made for inability to pay, the financial condition of MWG is not relevant in assessing any remedy to be selected. The economic reasonableness of a remedy goes to whether the cost of the remedy is reasonable as compared to other remedies – not to financial condition of a respondent.

in affirming my April 13, 2021 Order holding that NRG's financials are not relevant." H.O. July 13, 2022 Order, p. 11. His order was limited to the same information that he and the Board excluded from Mr. Shefftz's reports, which MWG specified in its motion. In fact, the Hearing Officer's July 13th Order states that "should the facts change at the remedy hearing under the terms of the Board Order, the door may open for complainants to offer evidence that MWG can draw on NRG's financial resources." H.O. July 13, 2022 Order, p. 11. He even quoted the Board's order: "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." Sept. 9, 2021 Order, p. 7. Here, the facts have not changed, and the only "argument" put forth by Complainants (that Koch's opinions were anything but rebuttal of their experts' opinions) was correctly rejected by the Hearing Officer. The Board should uphold the Hearing Officer's order precluding introduction of any documents, testimony or other evidence regarding the relationship between MWG and its indirect parent company, NRG, NRG's financial condition, and any potential economic impact on NRG of a penalty or compliance costs.[7]

III. The Hearing Officer Correctly Held that Ms. Koch's Opinions Have not Demonstrated the Relevance of NRG's finances

The Hearing Officer correctly stated that Ms. Koch's rebuttal opinions regarding MWG's ability to pay "do[es] not pass the threshold the Board envisioned when it held that complainants 'have not yet demonstrated the relevance of NRG's finances…'" H.O. July 13, 2022 Order, p. 14, citing to the Board Sept. 9, 2021 Order.[8] In the section of the Sept. 9, 2021 order that discusses the

[7] As explained in MWG's Motion to exclude Mr. Shefftz's opinions about NRG, the portions of the Shefftz opinion relating to calculation of weighted-average cost of capital ("WACC") do not relate the subject of its motion, because, as Mr. Shefftz explained, even if MWG were entirely unrelated to NRG, "then the NRG-specific WACC would still be a reasonably accurate proxy for the MWG cost of capital." MWG NRG Motion, fn 1, *citing* p. 16 of Ex. 2 of MWG's Motion in Limine to Exclude Jonathan Shefftz's Opinions, Feb. 4, 2022.

[8] The Hearing Officer cites to page 2 of the Board's opinion in his opinion, but the quoted sentence from the Board is from page 7 of the Board's September 9, 2021 Opinion.

relevancy threshold, the Board explained that the facts in this case more closely align with *Charter Hall v Overland Transportation System, Inc.*, PCB 98-81, (May 6, 1999). *Charter Hall* also involved a complainant asking the Board to consider the finances of a non-party when assessing a penalty. The Board in *Charter Hall* rejected that request, stating that the complainants had not established that the parent company, which was not a party to the matter, was responsible for the violations, and thus had not demonstrated that the information was relevant. *Id.* at 14. Based upon its analysis of *Charter Hall*, the Board held that, "NRG is not a party to the case, nor has it been alleged to have violated the Act or Board regulations in this matter." Board Sept. 9, 2021 Order, p. 7. Further, the Board stated that Complainants had not demonstrated the relevance of NRG's finances, and only if the facts change would the Board consider it. *Id.*

Here, there are no new facts and nothing has changed. MWG has not made an inability to pay claim, NRG is not a party, NRG has not been found responsible for the violations, and MWG continues to be an indirect subsidiary, incapable of demanding capital from NRG. As discussed in Section V.A below, despite uncontroverted evidence that NRG has no requirement or obligation to fund MWG, Complainants continue to make this false statement. Complainants also incorrectly suggest that Ms. Koch's responses to the opinions of Complainants' expert (Mr. Shefftz) constitute some sort of ability to pay argument. The Hearing Officer correctly found that Ms. Koch was entitled to rebut Complainants' experts' opinion about MWG. (See Section I above). Finally, as both the Hearing Officer and Board found, MWG has consistently objected to any reference to its relationship with its indirect parent, and the related financial information. Board Sept. 9, 2021 Order, p. 8, H.O. April 13, 2021 Order, p. 5.

Because the facts are to the same as they were in 2021, the Hearing Officer was correct to hold that Ms. Koch's report and rebuttal opinions did not crest the Board's relevancy threshold, and that the NRG financial information continues to be irrelevant.

IV. "Ability to Pay" is Not a Relevant Consideration Under Sections 33(c) or 42(h) Unless Inability to Pay is Claimed

Complainants inherently misunderstand how the Board applies the 33(c) factors regarding the economic reasonableness of a remedy. In both appeals, Complainants state, "Complainants in fact intend to offer evidence that a remedy or penalty is "economically reasonable," and appear to suggest they will do so by assessing the financial capabilities of MWG to conclude that MWG has the "ability to pay." NRG Appeal, p. 4, Koch Appeal, p. 8.[9] Complainants fail to recognize that such financial information is irrelevant unless and until there is a claim of an inability to pay – which has not been made. Determining the economic reasonableness of a corrective action or a penalty under the Act does not consider the financial capacity of a respondent. 415 ILCS 5/33(c), 42(h). 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. v. Illinois Pollution Control Board*, 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*, PCB94-146 (Oct. 17, 1996) 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

[9] Complainants' claim of a proposed "remedy" at the hearing is mystifying. They have withdrawn their original groundwater expert's remedy, and their replacement groundwater expert testified that he has no remedy to recommend. *See* FN 2, *supra*.

economically sound abatement measures better fit under the Act's reasonableness requirement. *Id.* at *48-49, *55. *See also People of the State of Illinois v. Victor Cory*, PCB 98-171, (July 22, 1999), *14 (Board considered whether the potentially high cost of a corrective action was economically reasonable).

Similarly, under Section 42(h) the Act itself guides when financial status becomes relevant. Section 42(h) provides that "…the Board shall ensure, in all cases, that the penalty is at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship." *People of the State of Illinois v. CSX*, PCB No. 07-16, 2007 Ill. ENV LEXIS 296, *15, citing 415 ILCS 5/42(h). Thus, financial status is not relevant until there is a claim of unreasonable financial hardship – which is not the case here.

Very simply, and as the Board has already concluded in this matter, the Board considers a party's ability to pay as relevant after a party claims an *inability* to pay. *See People of the State of Illinois v. Berniece Kershaw and Dawin Dale Kershaw*, 1995 Ill. ENV LEXIS 418, *27 (April 20, 1995) (Board rejected respondents' claims of inability to pay penalty); *People of the State of Illinois v. Oak Valley Wood Products, Inc.*, 1993 Ill. ENV LEXIS 12, *4 (January 7, 1993) (Board ordered respondent to submit tax return to demonstrate inability to pay a higher penalty); *Illinois EPA v. Jake's Auto & Wrecking Co., Inc.*, 1972 Ill. ENV LEXIS 418, *3-4 (August 15, 1972) (Board reduced penalty due to respondents inability to pay).

MWG's financial condition and whether it can "afford" the costs of the purported remedy and penalty Complainants claim (even though the remedy appears to have been selectively withdrawn by Complainants' new expert) are not relevant. Instead, as the Board and the Hearing Officer have correctly ruled, only if MWG made a claim of inability to pay, then the Complainants may reassert its arguments.

V. Complainants Improperly Conflate Consideration of the Financial Information of MWG (the Party) and NRG (Not a Party)

Even if MWG claimed an inability to pay, which it has not, Complainants improperly conflate two legally distinct issues: (i) whether a party (MWG) may claim inability to pay when considering the Section 33(c) and 42(h) factors, versus (ii) whether the financial resources of an indirect, non-party parent company (NRG) are relevant to the analysis of *respondent's* inability to pay. The first issue is not disputed –*a party* may claim inability to pay, after which the Board may consider the party's size (or possibly financial condition) as relevant. *See supra* Sec. IV. The second issue – a party's access to outside financial resources after it claims inability to pay -- is where Complainants go astray. By merging the two distinct issues, Complainants' wrongfully claim that the financial status of MWG's indirect parent, NRG, is somehow relevant to whether MWG has an "ability" to pay based upon their baseless claim that MWG has "clear and easy access" to any other financial resources. Koch Appeal, p. 7. [redacted] In any case, even if MWG were to claim inability to pay, allowing Complainants to reach through (pierce the corporate veil) to MWG's indirect parent is in direct conflict with Illinois corporate law and Board opinions.

A. MWG Has No Access To Capital Other Than Its Own

Complainants' claim that MWG has "clear and easy access" to its indirect parent company is an intentional misrepresentation of facts to the Board. [redacted]

[redacted] Even if consideration of an indirect parent corporation's financial information were allowed, which it is not (see *infra* Sec. V.B), [redacted]

B. Illinois Corporate Law Bars Consideration of MWG's Parent Finances

Illinois corporate law forecloses any consideration of MWG's parent finances. It is an accepted principle 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 must 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). Additionally, Illinois law is clear that some administrative overlap between a subsidiary and a parent corporation is insufficient to demonstrate that the subsidiary is the alter-ego of the parent. *See Larson v. CSX Transp., Inc.*, 359 Ill. App. 3d 830, 840, 835 N.E.2d 138, 145 (1st Dist. 2005) (Court held that administrative overlap between parent and subsidiary did not demonstrate the subsidiary is the alter-ego of a parent). The Board has similarly held that to pierce the corporate veil under an alter ego theory, a party must show that there is a unity of identity between the corporation and its owner, and that recognizing the separate corporate identity would sanction a

[10] Based on the Hearing Officer's and Board's findings that NRG is not a party and its financial information is not relevant, Mr. Callen's testimony is similarly not relevant. Mr. Callen is no longer an employee of NRG.

fraud or promote injustice. *People of the State of Illinois v. Wayne Berger and Berger Waste Management*, 1999 Ill. ENV LEXIS 175, *20-21, PCB 94-373 (May 6, 1999).

C. Conflating a Party's Inability to Pay with a Non-Party's Financial Status Would Lead to Absurd Results

Reviewing a *non-party's* financial status in consideration of a *party's* inability to pay leads to extreme results. Whether a respondent has access to other forms of capital or financial assistance outside its own economic and corporate status is not a relevant factor when evaluating a penalty or corrective action. Besides the clear conflict with corporate law (*see supra* Sec. VI.B), if the Board considered a corporate respondent's potential to access to an unnamed third party's finances, where does the inquiry end? In a future case, a complainant will argue that the Board should consider a corporate respondent's access to lines of credit to determine whether the corporate respondent could borrow funds sufficient to withstand a higher penalty or corrective actions. Or, if the respondent is an individual or family owned business, a complainant will argue that the Board should demand information from that party's banks, family, and peers for the ability to access to funds to analyze the respondent's ability to pay.

By allowing consideration of a parent finances, *any* parent company would be considered as a source of funds to assess a Board order, regardless of the separate legal status of the parent. Thus, if the Board imposed a penalty by arbitrarily considering the assets of an indirect parent company, it would regularly force responsible named parties to pay inflated penalties based upon the financial status of a non-party not required to pay or finance its subsidiary, potentially bankrupting the responsible party. This would be directly contrary to the premise that a penalty should serve the goal of compliance without "being unduly punitive and excessive." *People ex rel. Raoul v. Lincoln, Ltd.*, 2021 IL App (1st) 190317-U, ¶ 36.

VI. CONCLUSION

For the reasons stated herein, in the Board should uphold the Hearing Officer's decision to preclude the introduction of any documents, testimony or other evidence regarding the relationship between MWG and its indirect parent company, NRG, NRG's financial condition, and any potential economic impact on NRG of a penalty or compliance costs. The Board should also uphold the Hearing Officer's denial of Complainants' motion to exclude opinions from MWG's economic expert's (Ms. Koch) because the opinions were clearly rebuttal to Complainants' expert.

Respectfully submitted,
MIDWEST GENERATION, LLC
By: /s/ Jennifer T. Nijman
One of Its Attorneys

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EXHIBIT 1

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,
Complainants,
V.
MIDWEST GENERATION, LLC,
Respondent.

PCB No-2013-015
(Enforcement Water)

****

ORAL AND VIDEOCONFERENCED DEPOSITION OF

GAYLE SCHLEA KOCH

OCTOBER 22, 2021

(Reported remotely.)

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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.

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

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

A Well, I --

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

A Yeah. I'm going to point to what's in my report which I considered, which is looking at Midwest Gen's financials, that during the compliance period they were actually -- or the -- not compliance period, the early portion here, up until 2014, they were in bankruptcy. And [redacted] so I'm just presenting the information for the board to make that determination. But the financials don't support the level that Mr. Shefftz is recommending.

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

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

Q Okay.

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

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

A Correct.

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

MS. GALE: Objection; asked and answered.

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

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

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

So I think the numbers speak very clearly for themselves, and I do present them here for the board to consider. It's 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.

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

THE COURT REPORTER: Which I believe are valid.

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

THE COURT REPORTER: Thank you.

MR. WANNIER: Good catch, Kristen.

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

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

Q (BY MR. WANNIER) [redacted]

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

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

[redacted]. They probably want to look at additional information, but I'm not the one that would provide that, [redacted] But I did want -- it was one very large number. It's a large ARO.

EXHIBIT 2

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,)
COMPLAINANTS,)
-VS-)NO. PCB 2013-015
MIDWEST GENERATION, LLC,)(ENFORCEMENT - WATER)
RESPONDENT.)

DISCOVERY DEPOSITION OF

JONATHAN S. SHEFFTZ

CHICAGO, ILLINOIS

OCTOBER 28, 2021

ATKINSON-BAKER, A VERITEXT COMPANY
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REPORTED BY: CHERYL LYNN MOFFETT, CSR NO. 084-002218
FILE NO. 4949402

Q. Okay. So, you are making an ability to pay opinion?

A. Now, I know we're not supposed to discuss this one, but I just want to see if I used specific language here.

MR. WANNIER: I'm just going to say objection to the extent it calls for a legal conclusion as to the nature of the opinion that is or is not being offered, objection to the extent it misstates the testimony, asked and answered, vague, foundation. I'll stop there. Form. You can go on.

THE WITNESS: I generally in this field will use the two terms interchangeably.

BY MS. GALE:

Q. Okay.

A. So, yes, that's what I mean by that. If something is affordable, then -- if something is affordable to an entity, whether a company or person, then that person is or company or other entity is able to pay it.

Q. Did you run the ABEL model in this instance?

A. No, I did not.

Q. Okay. But you know the ABEL model uses three to five years for projections. Correct?

EXHIBIT 3

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.

EXHIBIT 4

NON-DISCLOSABLE INFORMATION AND FILED WITH THE BOARD PURSUANT TO PART 130 O THE BOARD RULES

EXHIBIT 5

NON-DISCLOSABLE INFORMATION AND FILED WITH THE BOARD PURSUANT TO PART 130 O THE BOARD RULES