

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,)	
)	
Respondents)	

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that I have electronically filed the non-confidential version of the **COMPLAINANTS' MOTION FOR INTERLOCUTORY APPEAL OF THE HEARING OFFICER'S ORDERS REGARDING ECONOMIC IMPACT TESTIMONY** in the above-captioned case today, copies of which are hereby served upon you. PLEASE TAKE NOTICE that I have also filed the enclosed hard copies containing non-disclosable information in the above-captioned case today, copies of which are hereby served upon you.

Faith E. Bugel

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Dated: July 26, 2023

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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Complainants,)	(Enforcement – Water)
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MIDWEST GENERATION, LLC,)	
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Respondent)	

COMPLAINANTS’ MOTION FOR INTERLOCUTORY APPEAL OF THE HEARING OFFICER’S ORDERS REGARDING ECONOMIC IMPACT TESTIMONY

Pursuant to Section 101.518 of the Pollution Control Board General Rules, Complainants Sierra Club, Inc., Environmental Law and Policy Center, Prairies Rivers Network and Citizens Against Ruining the Environment (collectively, “Citizens Groups” or “Complainants”) move the Illinois Pollution Control Board for interlocutory appeal of the Hearing Officer’s conflicting orders on the permissibility of economic impact testimony by Jonathan Shefftz and Gayle Koch. As grounds for the motion, Complainants state as follows:

1. On February 10, 2021, MWG filed a Motion in Limine to exclude sections of Complainants’ Expert Jonathan Shefftz’s Report (“MWG Motion”), focusing on the sections of Mr. Shefftz’s report explaining the close operational and financial relationship between MWG and its parent company, NRG Energy, Inc.¹ The NRG-specific information that was at issue in MWG’s

¹ Midwest Generation, LLC’s Mot. in Lim. to Exclude Sections of Compl.’s Expert Report 2-3 (Feb. 10, 2021). Hr’g Officer Order at 5 (Apr. 13, 2021)

Motion in Limine related to his opinion that it would be economically reasonable to expect a company of NRG's size to pay a given remedy cost and penalty amount. 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, and that therefore Complainants could not offer information relating to the economic impact of a remedy or penalty.²

2. 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 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."⁵

3. In response to this ruling, Complainants submitted a revised version of Mr. Shefftz's initial report as Exhibit 1201, which included redactions of all information relating to NRG and its relationship with MWG.⁶ In addition, on October 26, 2021, Complainants submitted a Second Supplemental and Rebuttal report containing the expert opinion of Mr. Shefftz regarding the economic impact remedy costs and a penalty would have on MWG, based on MWG-specific

² Hr'g Officer Order at 5 (Apr. 13, 2021).

³ Compls.' Mot. for Interlocutory Appeal from Hr'g Officer Halloran's Order Granting Mot. in Lim. to Exclude Sections of Compls.' Expert Report (Apr. 27, 2021).

⁴ Midwest Generation, LLC's Resp. to Compls.' Mot. for Interlocutory Appeal from Hr'g Officer Order at 3, fn. 3 (May 11, 2021).

⁵ Order of the Bd. at 8 (Sept. 9, 2021).

⁶ Complainants also submitted a revised version of Mr. Shefftz's first Supplemental and Rebuttal Report, Exhibit 1203, to remove the very minor references to his previous opinions on economic impact contained in Exhibit 1201. Exhibit 1203 does not otherwise contain any analysis of economic impact issues.

financial data.⁷ Among his conclusions in this report were that the compliance costs he relied upon, and a penalty based on the economic benefit of having delayed those costs, would be

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4. Ms. Koch's expert report, Exhibit 1901, principally discusses MWG's financial situation in one section on pages 28-29 of her report, although allusions to that discussion (as part of her broader reference to the multi-factor "economic reasonableness" determination) appear in several different sections of her report.⁹ Her discussion of MWG's financial situation was presented in the context of expert conclusions she offered that certain compliance and penalty costs ██████████

██████████¹⁰ Specifically, Ms. Koch takes the position that there are two distinct elements of the "economic reasonableness" determination: first, what is economically reasonable independent of the entity paying; and second, what is economically reasonable given the financial capabilities of the payer (taking into account the economic impact on that payer).¹¹ Most of the references to "economic reasonableness" in Exhibit 1901 refer broadly to both elements of the determination; however, the discussion on pages 28-29 of her report regarding MWG financials is only relevant to the economic impact portion of her opinion on economic reasonableness,¹² and is therefore the focus of this Motion.

5. On February 4, 2022, Complainants filed a Motion in Limine to exclude those portions of Ms. Koch's expert report referencing MWG's financial information, or in the alternative to

⁷ Ex. 1207, Second Suppl. and Rebuttal: Expert Op. on Econ. Benefit of Noncompliance and Econ. Impact of Penalty and Compliance Costs.

⁸ *Id.* at 1.

⁹ Ex. 1901, Expert Report Prepared by Gayle Schlea Koch at 28-29 (Apr. 22, 2021) (Other allusions to the "economic reasonableness" determination appear on pages 1-2, 6, 19, 24-25, and 27).

¹⁰ *Id.* at 29.

¹¹ June 15, 2023 Hr'g Tr. at 117:10-118:24

¹² *Id.* at 119:1-12.

reinstate those portions of Mr. Shefftz's expert report discussing NRG's financial information.¹³

On March 4, 2022, MWG filed a response in opposition to Complainants' Motion in Limine, in which MWG claimed that Ms. Koch's opinions regarding MWG's financial capabilities were provided "solely in rebuttal to Mr. Shefftz."¹⁴ MWG went on to state that, in the event that Mr. Shefftz's opinions regarding whether certain compliance costs and penalty amounts are [REDACTED] are excluded from this case, then "Ms. Koch's responsive opinions [would be] no longer required."¹⁵

6. On July 13, 2022, Hearing Officer Halloran denied both requests in Complainants' Motion in Limine, determining that MWG had not yet "pass[ed] the threshold" for when NRG financial information would become relevant, and that Koch's discussion of MWG financial information was nonetheless admissible because it "was merely rebutting Mr. Shefftz's report regarding MWG's ability to pay."¹⁶ The Board upheld the Hearing Officer's decision after Complainants appealed.¹⁷

7. During the hearing that took place between May 15-19 and June 12-15 of 2023 (the "2023 Hearing"), the Hearing Officer refused to allow admission of Exhibit 1207, Mr. Shefftz's Second Supplemental and Rebuttal Report, because it contained Mr. Shefftz's opinions regarding the economic impact of a remedy or penalty on MWG. This ruling was based on his assessment that

¹³ Compls.' Mot. in Lim. to Exclude Portions of Resp't's Expert Report, or in the Alternative to Reinstate Portions of Compls.' Expert Report (Feb. 4, 2022).

¹⁴ Midwest Generation, LLC's Resp. in Opp'n to Compls.' Mot. in Lim. to Exclude Portions of Gayle Koch's Expert Report at 2 (Mar. 4, 2022).

¹⁵ *Id.* at 4.

¹⁶ Hr'g Officer Order at 14 (July 13, 2022).

¹⁷ Order of the Bd. at 11 (Dec. 12, 2022).

any evaluation of the economic impact of a remedy or penalty is outside the scope of the factors that are considered by the Board.¹⁸

8. Conversely, during Complainants' examination of Ms. Koch, the Hearing Officer denied Complainants' complementary request to exclude the portion of Exhibit 1901 containing Ms. Koch's opinions regarding the economic impact of a remedy or penalty on MWG.¹⁹ Complainants' examination of Ms. Koch's opinions on economic impact matters occurred within an offer of proof and are therefore not part of the official record.

9. When asked to identify for the record any actual analysis of economic impact issues contained within Exhibit 1201, Mr. Shefftz's initial expert report, following its redaction, Ms. Koch was not able to identify any such discussion.²⁰ Thus, the only discussion of economic impact by Mr. Shefftz that Ms. Koch was able to identify was contained in Exhibit 1207.²¹

10. The Hearing Officer's decision not to allow admission of Exhibit 1207, when combined with the redaction of Exhibits 1201 and 1203 pursuant to the Board's previous rulings in this case, has completely excised any remaining discussion of the economic impact of any given remedy or penalty amount from Mr. Shefftz's analysis. Thus, the circumstances justifying the Board's previous decisions to allow Ms. Koch to provide "responsive" expert testimony on economic impact issues no longer exist.

11. Complainants are not asking the Board to overturn the Hearing Officer's refusal to admit Exhibit 1207 into the record at this juncture, because we acknowledge his ruling is consistent with

¹⁸ May 16, 2023 Hr'g Tr. at 89:14-90:20.

¹⁹ June 15, 2023 Hr'g Tr. at 121:22-123:14, 124:19-125:126:3.

²⁰ June 15, 2023 Hr'g Tr. at 165:20-172:14 (making clear that "the only analysis that [Ms. Koch saw] remaining is some averaging of numbers," which "formed the basis for subsequent analysis").

²¹ June 15, 2023 Hr'g Tr. at 174:5-177:15 (identifying information in Exhibit 1207, which was not allowed into evidence, as containing the remaining information her testimony would be "a valid response to").

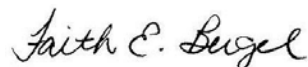
the law of this case, including precedent established by the Board that economic impact considerations, including affordability and ability to pay arguments, may not be pursued or presented by Complainants if they are not first presented by MWG.²²

12. However, the Hearing Officer, and by extension the Board, has an obligation to apply the rules of evidence equally and fairly to all parties.²³ It would unduly bias the remedy proceeding to allow MWG to offer an expert report that includes discussion of the economic impact of a remedy or penalty determination on MWG, while refusing to allow Complainants to offer such expert testimony. Thus, the portions of Exhibit 1901 containing such argumentation should be stricken from the record.

WHEREFORE this Court should grant Complainants' Motion for Interlocutory Appeal of the Hearing Officer's order overruling Complainants' objection to inclusion of the sections of Ms. Koch's expert report that address economic impact concerns and strike such discussion from her report. Specifically, the Board should strike pages 28 and 29 of Exhibit 1901 from the record, excepting her conclusion and signature.²⁴

Dated: July 26, 2023

Respectfully submitted,



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²² Complainants reserve the right to move for reconsideration of the Board's Orders disallowing information relating to the economic impacts of a potential remedy and penalty amount on MWG (including consideration of its close operational and financial relationship with NRG) in the event that MWG attempts to raise those issues in its post-hearing briefing.

²³ 35 Ill. Admin. Code § 101.610.

²⁴ Complainants are not moving to strike any of Ms. Koch's testimony from the 2023 Hearing regarding economic impact at this time because that testimony occurred within an offer of proof and is therefore not currently in the record.

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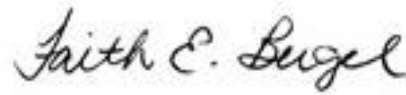
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CERTIFICATE OF SERVICE

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 the non-confidential version of the **COMPLAINANTS' MOTION FOR INTERLOCUTORY APPEAL OF THE HEARING OFFICER'S ORDERS REGARDING ECONOMIC IMPACT TESTIMONY** and mailed hard copies of the non-disclosable version before 5 p.m. Central Time on July 26, 2023, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 10 pages.

Respectfully submitted,



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Dated: July 26, 2023

Attachments

Ex. 1201

**THIS EXHIBIT IS NON-DISCLOSABLE IN ITS ENTIRETY
AND IS SEPARATELY PROVIDED TO THE ILLINOIS
POLLUTION CONTROL BOARD AND ELIGIBLE PARTIES**

Ex. 1207

**THIS EXHIBIT IS NON-DISCLOSABLE IN ITS ENTIRETY
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Ex. 1901

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