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
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC's Motion for Leave to File, *Instanter*, Its Reply to Complainants' Response to Motion in Limine and Motion for Stay and Respondent's Reply in Support of Its Motion in Limine to Exclude Sections of Complainant's Expert Report and Expedited Motion for Stay Pending the Board's Decision along with Non-Disclosable Exhibits (not filed with IPCB), a copy of which is hereby served upon you. The Motion, Reply, and Non-Disclosable Exhibits have been mailed to the IPCB, Don Brown.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: March 10, 2021

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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 Motion for Leave to File, Instanter, Its Reply to Complainants' Response to Motion in Limine and Motion for Stay and Respondent's Reply in Support of Its Motion in Limine to Exclude Sections of Complainant's Expert Report and Expedited Motion for Stay Pending the Board's Decision along with Non-Disclosable Exhibits (not filed with IPCB), a copy of which is hereby served upon you was filed on March 10, 2021 with the following:

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and that true copies were emailed on March 10, 2021 to the parties listed on the foregoing Service List. The Motion, Reply, and Non-Disclosable Exhibits have been mailed to the IPCB, Don Brown.

/s/ Jennifer T. Nijman

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RESPONDENT'S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY TO COMPLAINANTS' RESPONSE TO MOTION *IN LIMINE* AND MOTION FOR STAY

Respondent, Midwest Generation, LLC ("MWG"), submits this Motion for Leave to File, *Instanter*, its Reply to Complainants' Response to MWG's Motion *In Limine* to Exclude Sections of Complainants' Expert Report and Expedited Motion to Stay pursuant to Sections 101.500(e) and 101.514 of the Illinois Pollution Control Board's ("Board") Procedural Rules. 35 Ill. Adm. Code 101.500(e), 101.514. A reply brief is warranted because Complainants' response reaches beyond MWG's motion and proposes that the Board engage in an entirely new approach in this case – inserting "ability to pay" from federal law into the Illinois Environmental Protection Act ("Act") for assessing a penalty or remedy, and automatically including an indirect parent company's financial status when assessing ability to pay status [redacted]. In support of its motion, MWG submits its Reply and states:

1. On February 24, 2021, Complainants filed their Response to MWG's Motion *In Limine* to Exclude Sections of Complainants' Expert Report and Expedited Motion to Stay.

Complainants' Response presents new arguments that attempt to apply a new set of conditions to the Act and the Board's factors for making orders and determinations.

2. First, Complainants rely on federal case law to argue that the Board must analyze "ability to pay" when that language does not appear in either Sections 33(c) or 42(h) of the Act. 415 ILCS 5/33(c), 42(h). The federal cases Complainants rely on are inapplicable because ability to pay is expressly cited as a factor for review in the federal statutes at issue, and because even in those cases a parent's finances are only deemed relevant where the parent has a clear obligation to support or fund the subsidiary. That is not the case here.

3. Ability to pay is not expressly referenced as a factor to consider in Sections 33(c) and 42(h) of the Act. Further, the uncontroverted testimony, ignored by Complainants' expert, is [redacted] *See* MWG's Third Supplemental Response to Complainant's First Set of Interrogatories, Nov. 2, 2015, attached to the Reply as Ex. 1, and 2016 deposition of David Callen, excerpts attached to the Reply as Ex. 2.

4. Second, Complainants improperly rely on the Board's decision in *Panhandle* to suggest that a parent's finances can automatically be considered by the Board. *People of the State of Illinois v. Panhandle Eastern Pipe Line Co.* PCB99-191, Nov. 15, 2001. Complainants fail to point out that the issue of the parent's relevance was not before the Board in that case − no party objected to considering the parent's finances, so the Board did not decide the relevance. In contrast, in this case MWG has repeatedly objected to the relevance of considering NRG's finances because NRG is not a party to this case and the Board's Interim Opinion makes findings of liability only against MWG. See *Johns Manville v. Illinois Dept. of Transportation*, PCB 14-3 *slip op. *4* (Dec. 21, 2017); *See also St. Croix Renaissance Group v. St. Croix Alumina*, 2010

U.S. Dist. LEXIS 122611 *3-5 (D.V.I. Nov. 18, 2010) (Court barred plaintiffs' expert from testifying about the financial condition of the defendant's parent company because the parent corporation was not a party).

5. By ignoring the fact that MWG cannot simply demand funding from NRG, Complainants appear to be suggesting that a parent's finances should be considered by the Board [redacted]. In effect, Complainants are asking the Board to evaluate a non-party's ability to pay, which is an unwarranted expansion of the Act and Board's rules, and a conflict with recognized principles of corporate law.

6. Third, Complainants' arguments are a veiled attempt to treat MWG's indirect parent as the alter-ego to MWG, effectively making NRG a responsible party even though [redacted]. Complainants cannot be permitted to make these arguments long after the liability phase has passed.

7. MWG will suffer material prejudice if it is not permitted to reply to these new and unfounded arguments. If the Board elects to consider NRG's financial status in making its order and determinations, MWG could be subject to an inflated penalty based upon the financial status of a non-party not required to pay. [redacted] The sections of the Shefftz Opinion that concern NRG are not relevant and must be stricken.

8. Each of these issues raised by Complainants is new and goes beyond MWG's initial motion. MWG did not raise the federal law concept of "ability to pay" in its motion, did not rely on federal case law, and did not attempt to expand the scope of the Act. Expanding the scope of Sections 33(c) and 42(h) of the Act is a significant issue that requires full discussion and MWG's opportunity to reply.

9. Complainants also misrepresent the scope of MWG's request for stay, seeming to believe that MWG was requesting a stay of the entire case. As MWG clearly stated in its motion, its request for a stay is limited only to the economic expert's use of NRG as a basis for its opinions, and nothing more.

10. MWG has prepared its Reply in support of its Motion *in Limine* and Expedited Motion for Stay, which is attached hereto.

11. MWG respectfully submits that the filing of the attached Reply will prevent material prejudice and injustice by clarifying the scope of the relief Complainants request from the Board, and disputing new arguments presented by Complainants.

12. This Motion is timely filed on March 10, 2021, within fourteen (14) days after service of Complainants' Response on MWG, in accordance with 35 Ill. Admin. Code §101.500(e).

WHEREFORE, MWG respectfully requests that the Board grant Respondent's Motion for Leave to File Instanter, its Reply to Complainants' Response to Motion *In Limine* to Exclude Sections of Complainants' Expert Report and Expedited Motion to Stay, and accept the attached Reply as filed on this date.

Respectfully submitted,

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman
One of Its Attorneys

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Susan M. Franzetti
Kristen L. Gale
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	)	
Respondent.	)	

RESPONDENT'S REPLY IN SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE SECTIONS OF COMPLAINANTS' EXPERT REPORT AND EXPEDITED MOTION FOR STAY PENDING THE BOARD'S DECISION

Complainants attempt to impose a new, overreaching approach to Illinois Pollution Control Board ("Board") orders by asking the Board to automatically evaluate to the financial resources of an unnamed parent entity, regardless of the subsidiary's relationship with the parent or the parent's obligations to provide funding. In other words, not only are Complainants asking the Board to expand the Illinois Environmental Protection Act ("Act") to evaluate a party's ability to pay as a matter of course, but also to evaluate a *non-party's* ability to pay. Even if the availability of funds beyond a party's own was a relevant consideration, which it is not, the evidence is uncontested -- and Complainants are fully aware – [redacted].

Complainants further misstate MWG's request for a partial stay. MWG's request is limited *solely* to a stay of expert discovery on the economic issue concerning NRG and nothing more. The expert discovery on the other issues that will be tried at the damages hearing will continue,

including production of expert reports on any remedial actions that may be required. MWG seeks a decision on the relevance of NRG, an un-named indirect parent, so that resources and time in remaining discovery and at the hearing are not wasted.

A. "Ability to Pay" Via Access to Alternative Capital Other Than the Party Is Not a Factor to Consider Under the Act

Complainants mistakenly focus their response on the "ability to pay" and then seek to impose a new theory where the Board should consider the finances of any entity that might have the ability to fund a responsible party under the Act. Whether a named party has access to other forms of capital or financial assistance outside the named party's own economic and corporate status is not a factor the Board may consider under the Act when evaluating a penalty or corrective action.

A detailed review of the language in Section 33(c) and Section 42(h) of the Act reveals that "ability to pay" is not included, and, more significantly, nothing suggests that a person's potential to access capital outside of themselves should be considered. 415 ILCS 5/33(c), 42(h). While the Board has considered a party's ability to pay when a party claims an *inability* to pay, that is not the case here.[1] And where a party claims inability to pay, the Board limits its financial review to the named party, and not to the ability of the party to potentially access other funds. *See People of the State of Illinois v. Berniece Kershaw and Dawin Dale Kershaw*, 1995 Ill. ENV LEXIS 418, *27 (Ill. Pollution Cont. Bd. 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 (Ill. Pollution Cont. Bd. 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*

[1] A court has held that the Board may not consider the economic situation of a party and its ability to pay to increase a penalty. *Archer Daniels Midland Company v. Illinois Pollution Control Bd*., 119 Ill. App. 3d 428, 438 (4th Dist. 1983).

Co., Inc., 1972 Ill. ENV LEXIS 418, *3-4 (Ill. Pollution Cont. Bd. August 15, 1972) (Board reduced penalty due to respondents inability to pay).

Here, Complainants are attempting to shoe-horn a new standard for consideration – whether a party potentially has broader access to capital beyond its own economic resources. That is not the standard allowed under the Act, and would lead to absurd results in direct contradiction to corporate law. If the Board were to consider a corporation's potential to access to capital outside of itself, then the Board would also need to consider the corporation's access to lines of credit to determine whether the corporation would be able to borrow funds sufficient to withstand a higher penalty or corrective actions. If the party were an individual or family owned business, the Board could demand information from that party's banks, family, and peers for the ability to access to funds.

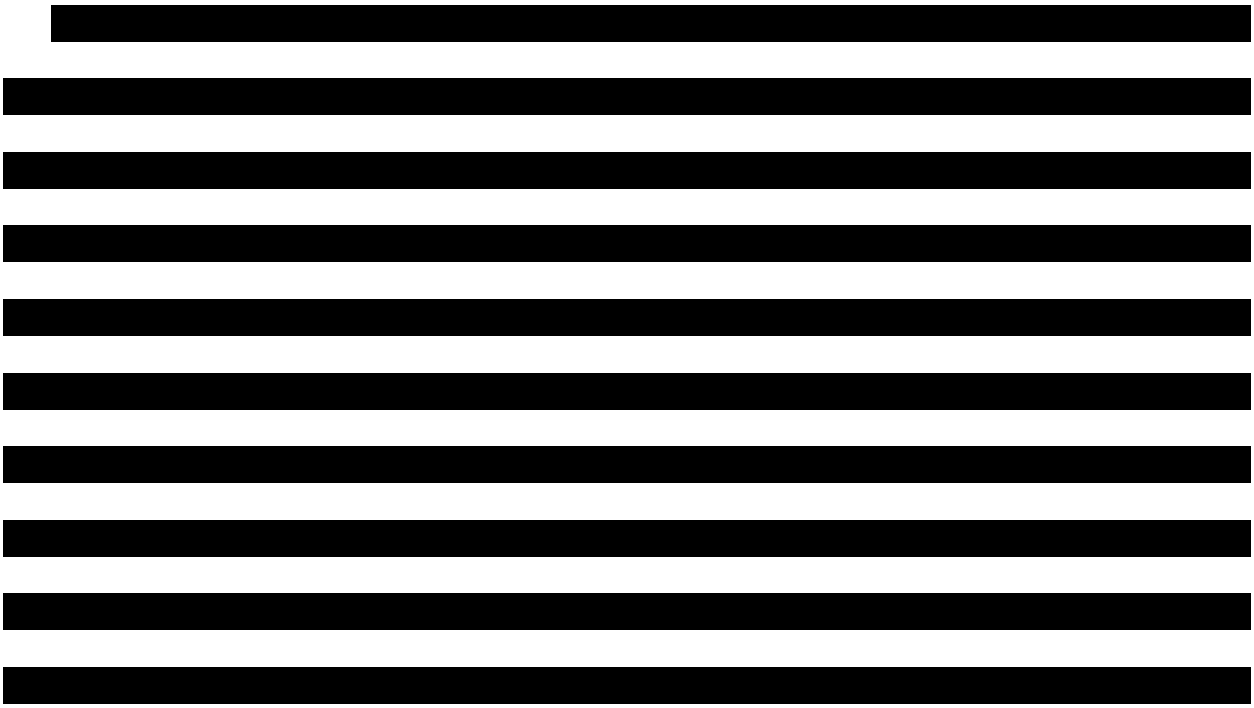
Moreover, under Complainants' theory, *any* parent company would automatically be considered as a source of funds for the purposes of assessing a Board order, regardless of the separate legal status of the parent. Thus, if the Board were to impose a penalty by arbitrarily considering the assets of an 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. This is clearly not how the Board operates, is directly contrary to corporate law, and has no support in the Act. As discussed in Section D below, the cases Complainants cite in support of their new theory are easily distinguished. In those cases, either the non-party parent's financial information was not at issue, or it was established that the non-party parent essentially financed the subsidiary. That is not the case here. Accordingly, the sections of the Shefftz Opinion about any party other than MWG are not relevant and must be stricken.

B. The Shefftz Opinions Regarding NRG are not Relevant Because MWG Does Not Have Access to NRG's Capital nor Financial Assistance

Even if it were relevant under the Act whether MWG has access to other capital, the Shefftz Opinion [redacted]. In fact, in an inexplicable lapse, Shefftz fails to even reference or cite to MWG's Third Supplemental Response to Complainant's First Set of Interrogatories, Nov. 2, 2015 (attached as Ex. 1) nor the 2016 deposition of David Callen, NRG's Chief Financial Officer (excerpts attached as Ex. 2), both of which carefully explained [redacted]

[redacted] The law in Illinois is clear that some overlap between a subsidiary and a parent corporation is insufficient to demonstrate that the subsidiary is the alter-ego of the parent. In *Larson v. CSX Transp., Inc*., 359 Ill. App. 3d 830, 840, 835 N.E.2d 138, 145 (1st Dist. 2005),

the plaintiff attempted to make a similar argument, that the parent and subsidiary relationship were so intimate that the court could consider the parent responsible. In that case, the parent and subsidiary had some overlap of employees, the plaintiff's paycheck was from the parent, and the trucks and credit cards the plaintiff used displayed the parent's name. *Id.* The court rejected the plaintiff's claims, stating that to demonstrate the subsidiary is the alter-ego of a parent, a party must demonstrate that the subsidiary was not operated on a stand-alone basis, that its management worked for interests other than its own, or that any of the coordination between the parent and the subsidiary was the result of anything other than an arm's-length exchange of services which furthered the independent goals of the subsidiary. *Id.* 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 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).



[redacted], the sections of the Shefftz Opinion that concern NRG are not relevant and must be stricken.

C. Federal Courts Generally Exclude Evidence Concerning a Parent's Financial Condition

Contrary to Complainants' assertion, a series of federal courts have rejected the very strategy Complainants are attempting here. In *St. Croix Renaissance Group v. St. Croix Alumina*, 2010 U.S. Dist. LEXIS 122611 *3-5 (D.V.I. Nov. 18, 2010), the court barred the plaintiffs' expert from testifying about the financial condition of the defendant's parent company because the parent corporation was not a party. Similarly, in *Adams v. Teck*, the court excluded an expert opinion just like the Shefftz Opinion, because it improperly considered a non-named parent corporation's financial status for the economic benefit analysis. *Adams v. Teck Comnico Alaska, Inc.*, 399 F.Supp.2d 1031, 1038 (D. Alaska 2005). The court specifically rejected the plaintiffs' reliance on *United States v. Union Twp.*, 150 F.3d 259 (3rd Cir. 1998), very case relied on by Complainants, finding *Union Twp.* only supports that a court may consider a parent's financial statement to assure that the penalty would not be set at a level above the subsidiary's ability to pay. *Id.* (emphasis added). *See also United States v. Dico, Inc.*, 4 F. Supp. 3d 1047, 1065 n. 43 (S.D. Iowa 2014),

aff'd in part, rev'd in part on other grounds, 808 F. 3d 342 (8th Cir. 2015) (Court refused to consider the asset of the non-party parent company finding it to be "somewhat at odds with the basic principle of corporate law that each incorporated business entity enjoys a separate legal existence."); *United States v. Mt. State Carbon, LLC*, 2014 U.S.Dist. LEXIS 97184, *94 (N.D.W.Va. July 17, 2014) (Court found that the non-party parent was "in no way liable or responsible for any civil penalties."); *United States v. Magnesium Corp. of Am.* 2006 U.S.Dist. LEXIS 39944, *14-16 (D. Utah 2006) (court denied motion to compel financial information about the defendant's parents, because the parent corporations were not parties to the case and the United States could not "back-door" a veil-piercing that was disallowed in *Bestfoods*.)

Just like the federal courts stated here, the Board should also exclude the sections of the Shefftz Opinion regarding NRG, because NRG is not a party and thus those opinions are not relevant to this matter.

D. The Cases Cited by Complainants are Either Inapplicable, or Confirm that a Parent's Finances Could be Relevant Only when the Parent is Required to Pay

The cases relied upon by the Complainants are inapplicable. In all of the cases, the parties demonstrated that the parents' finances were relevant, either by not objecting to consideration of the parent or by showing that the parent specifically provided financial support to the subsidiary.

i. In *Panhandle*, the Relevance of the Parent Company's Finances was not at Issue

Complainants' reliance on *People of the State of Illinois v. Panhandle Eastern Pipe Line Co.* PCB99-191, Nov. 15, 2001 is misleading, at best. In *Panhandle* , the Board was never faced with the question of whether the parent's finances should be considered because no one raised it. It was simply not at issue. During the hearing there were no objections to including consideration of the parent's financial status as part of the penalty analysis. *See* Sept. 19, 2000, *Transcript*, p. 358-359 attached as Ex. 4. While the entire record is not available on the Board's website, a review

of the documents on file indicates that no party objected to consideration of the parent company's financials during discovery. *Panhandle,* Case Activity located at https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=4042. Moreover, both the complainant and the respondent presented the respondent's parent's financials as part of the economic consideration. *Panhandle,* Nov. 15, 2001, p. 30. It is disingenuous to argue that the Board in *Panhandl*e considered the parent's finances when the issue of *whether* to consider the parent's finances was never before the Board.

In contrast, MWG repeatedly objected to the relevance of NRG's finances. In fact, prior to Mr. Callen's second deposition in 2020, counsel for MWG again raised the issue both before the deposition and on the record. Ex. 3, Callen 2020 Dep. p. 10:9-11 ("we would object as we have stated to the court, to the relevance of information concerning the financial status of NRG Energy, Inc."); Ex. 5 MWG's Responses to Complainants' Fifth Set of Document Requests, p. 5 – 6 ("MWG objects…because it…requests information that is not relevant and not reasonably calculated to lead to relevant, discoverable evidence"). Complainants argued that discovery is broad, and they believed they were entitled to pursue information on any connection between MWG and its parent. Through discovery, Complainants learned that [redacted], the Shefftz Opinion should not include [redacted].

ii. Under Federal Law, a Parent's Financial Information may only be Relevant if the Parent Provides Financial Support

The few federal cases Complainants rely upon similarly do not support their broad expansion of the Act. Each of the federal cases cited concerned penalties under federal law, which explicitly state that "ability to pay" is a consideration. 33 U.S.C. § 1319(g)(3); 42 U.S.C § 7413. As stated

above, the Act does not state that a party's ability to pay is a factor to consider in Sections 33(c) or 42(h), and the Board has historically only considered it when the party claims an inability to pay. *See supra* Sec. A. Moreover, contrary to Complainants' claim, the federal cases do not support generally looking to a parent's financial status as part of a penalty analysis, even for those statutes that specifically cite ability to pay as a factor. Instead, they only look to a parent's financial status if it is established that the subsidiary is financed by the parent or is financially reliant such that review is necessary. In *United States v. Union Twp.*, the parent company was "siphoning off profits from" the subsidiary and had complete control whether the subsidiary achieved compliance, indicating that the parent worked for its interests and provided financial support. *Union,* 150 F.3d at 268. The Third Circuit stated that due to those facts, the parent's financial resources are highly relevant to assure that the penalty was not set above the subsidiary's ability to pay. *Id.* Similarly, in *Idaho Conservation League v. Atlanta Gold Corp.*, 879 F. Supp. 2d 1148 (D. Idaho 2012), the court found that consideration of a parent corporation's financial information was relevant because the parent company raised money from the subsidiary through "cash calls" that were recorded as intercompany loans, and the parent company "provided [the subsidiary] with a steady source of financing." *Id*. at 1170. In *In re: Carroll Oil Company*, 10 E.A.D. 635 (2002), the defendant and its "sister" company had financial agreements such that the sister company was a legitimate source of funds. Id at 668.

Here, even if ability to pay were at issue, [redacted]

E. MWG's Request for a Stay is Limited in Scope

Complainants clearly misunderstand the scope of MWG's request for a stay and spend considerable resources detailing the bases for a stay of the entire proceeding. MWG is not seeking

to stay the proceeding. MWG's request is limited *solely* to the economic expert issue concerning NRG and nothing more. MWG has already complied with the discovery schedule and named its experts, and will timely provide the expert reports for the other issues that will be presented at the damages hearing, including MWG's experts in response to Complainants' expert on remediation, MWG's expert on the economic value of the MWG's stations, and MWG's expert concerning MWG's financial condition. However, MWG will suffer irreparable harm if it is forced to prepare and produce detailed financial opinions about NRG – an entity that is not named in this proceeding. A limited stay of this parent-liability issue will allow the parties to tailor the opinions and responses to the issues that will be presented at the hearing. Thus, to reduce confusion on the scope of the economic issues, the Board should immediately stay discovery only on this economic issue.

F. CONCLUSION

For the reasons stated herein, in MWG's Motion to *in Limine* and Expedited Motion for Stay and the supporting Memorandum of Law in Support, MWG respectfully requests that the Board strike the portions of the Shefftz Opinion that address NRG because it is not relevant. MWG further requests that the Board immediately stay discovery on the NRG economic issue until it issues a decision on MWG's Motion *in Limine*.

Respectfully submitted,

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman
One of Its Attorneys

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Electronic Filing: Received, Clerk's Office 03/10/2021

EXHIBIT 1

NON-DISCLOSABLE DOCUMENTS

EXHIBIT 2

NON-DISCLOSABLE DOCUMENTS

Electronic Filing: Received, Clerk's Office 03/10/2021

EXHIBIT 3

NON-DISCLOSABLE DOCUMENTS

Electronic Filing: Received, Clerk's Office 03/10/2021

EXHIBIT 4

Electronic Filing: Received, Clerk's Office 03/10/2021

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,
vs. No. PCB 99-191
PANHANDLE EASTERN PIPE LINE COMPANY,
Respondent.

Proceedings held on September 19, 2000, at 9:35 a.m., at the offices of the Illinois Pollution Control Board, 600 South Second Street, Suite 403, Springfield, Illinois, before John C. Knittle, Chief Hearing Officer.

VOLUME II

Reported by: Darlene M. Niemeyer, CSR, RPR
CSR License No.: 084-003677

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11 North 44th Street
Belleville, IL 62226
(618) 277-0190

There were a couple of years that were missing and, in fact, I don't think I had any information relating to 1988, if I am not mistaken. And then the 10-K filings coming off of the SEC website for periods after that. In addition to that, I used the standard stock records, stock prices from bigcharts.com, and I may have used a couple of other sources that I don't necessarily remember.

Q. Okay. If I could direct your attention, Dr. Nosari, I think there is an exhibit before you that is People's Exhibit Number 7?

A. Yes.

Q. Have you located that document?

A. Yes, I have.

Q. Have you seen this document before?

A. Yes.

Q. Let me just back up for just a moment. I think that you mentioned before that you had attained financial data for Panhandle Eastern Pipe Line Company?

A. Yes.

Q. Why did you decide to attain financial information for this company?

A. Well, first of all, I used Panhandle -- I think you used the term Panhandle Eastern Pipe Line, and I used Panhandle

Eastern, which is the parent company of the Pipe Line Company.

Q. Why did you decide to use the parent company's financial information?

A. Because Panhandle Eastern Pipe Line Company is a wholly-owned subsidiary, which means that its financial situation is managed by the parent.

Q. Okay.

A. Another -- well, that is okay.

Q. Dr. Nosari, do you have anything further that you want to provide as an explanation to your last question -- as an answer to the last question?

A. Well, when I said that it was wholly-owned, and I don't

remember exactly what I said, but I used the parent company because it manages Panhandle Eastern Pipe Line Company, meaning that it is a related party and thus the best estimate of cost of capital would come from the parent company's financial statements and not from the subsidiary, because the parent would influence the subsidiary.

Q. Okay. Thank you.

MS. CARTER: Just one moment. I need to find this document.

Q. (By Ms. Carter) Where did you attain the SEC 10-K filings?

A. Well, the 10-K filings that I used we got off of Edgar.

Electronic Filing: Received, Clerk's Office 03/10/2021

EXHIBIT 5

NON-DISCLOSABLE DOCUMENTS